AN

ELEMENTARY COMPENDIUM

OF

THE LAW

OF

REAL PROPERTY.

BY WALTER HENRY BURTON, ESQ.

LATE ONE OF THE FELLOWS ON MR. VINER'S FOUNDATION
FOR THE STUDY OF THE COMMON LAW
IN THE UNIVERSITY OF OXFORD.

THE FIFTH EDITION,

With Notes, showing the Alterations in the Law to the present Time,

BY EDWARD PRIESTLEY COOPER, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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TO THE

CHANCELLOR, MASTERS, AND SCHOLARS

OF THE

UNIVERSITY OF OXFORD,

THIS WORK,

IS RESPECTFULLY INSCRIBED,

BY THEIR

MUCH OBLIGED SERVANT,

THE AUTHOR.

PREFACE.

The production, at this day, of a new elementary work on the Law of Real Property, may be thought to require some apology. And this, if it were the Author's design or wish to supersede any of the Books now in use, it would not be easy for him to make: but in aspiring to add one to the number, he has only to show that a vacant space was left for his exertions. And that such a space existed, he conceives every person must be sensible, who happens to have passed at once from the perusal of Blackstone's Commentaries to the business of a Conveyancer's Office, and to the necessity of seeking for practical information, not indeed in the Year Books, or immediately in any Book of Reports, or in any thing that bears the character of Black Letter, (except perhaps Coke upon Littleton, or the Touchstone,) but in some ample Digest or Treatise of modern date; which, however excellent in itself, must encumber his unpractised search by that very copiousness and minute accuracy to which it owes much of its value. It has therefore been the Author's endeavour to adapt his work (though intended to be

as complete as possible in itself,) principally to such readers as, being already acquainted with Blackstone, were desirous of further progress, and of an introduction to more scientific or technical preceptors. In pursuing this plan he has had to attend to four paramount objects, namely, selection, method, condensation, and perspicuity. In the first of these he has always chiefly regarded utility; in the second, progressive illustration; and has done his utmost to reconcile the third and fourth; while, in order to promote them all, or at least the three last, he has subdivided the whole book into numbered *placita,* to which the corresponding numbers in the margin refer. The other references, it is hoped, will in general conduct the reader to the best sources of information, and, directly or indirectly, to satisfactory authorities; by help of which he may exercise his own judgment on every part of the text.

To several of his friends the Author is indebted for criticisms and suggestions, of which he has availed himself. Had these been as numerous as he wished, they might have enabled him to present his work to the public with some degree of confidence. At present he can only venture to hope that, if it be found in any degree useful, its inevitable defects will be pardoned.

ADVERTISEMENT

TO THE FIFTH EDITION.

In preparing a new Edition of the excellent and popular work of the late Mr. W. H. Burton, (which has passed through three anonymous Editions since the Author's death,) the present Editor has attempted to supply such new matter as the numerous and important alterations in the Law of Real Property have rendered necessary, by introducing notices of the recent enactments wherever the original text seemed to require them; preserving at the same time the text itself unaltered. In doing this, he has endeavoured to preserve the compendious character of the work, and yet, as far as possible, to adhere to the phraseology, and, in many cases, to the very words of the Legislature.

He has also noticed some points of law which have been either agitated or decided since the original publication of the work in 1828; and has added, in the margin, references to many subsequent cases, bearing more or less directly on the subjects treated of in the text.

The Editor's additions, both in the notes and in the margin, are indicated by brackets.

E. P. C.

7, Old Square, Lincoln's Inn,
Michaelmas Term, 1840.

CONTENTS.

Sect. 4.—*Of Alienation by Will.*

Sect. 5.—*Of Descent, Curtesy, and Dower.*

Sect. 6.—*Of Rights of Entry and Action.*

Sect. 7.—*Of Evidence of Title to Land in Fee Simple.*

CHAP. II.

OF ESTATES IN FEE TAIL.

Sect. 1.—*Of the Nature and Creation of Estates Tail.*

Sect. 2.—*Of the Alienation of Estates Tail.*

CHAP. III.

OF ESTATES FOR LIFE.

Sect. 1.—*Of the various Kinds of Estates for Life.*

Sect. 2.—*Of the Alienation, Forfeiture, and Merger of Estates for Life.*

CHAP. IV.

Sect. 1.—*Of Settlements by Deed.*

Sect. 2.—*Of Settlements by Will.*

CHAP. V.

OF CHATTEL INTERESTS.

Sect. 1.—*Of the different Kinds of Chattel Interests.*

Sect. 2.—*Of the Alienation and Extinction of Chattel Interests by Deed or other Contract.*

Sect. 3.—*Of the Testamentary Alienation and Posthumous Transmission of Chattel Interests.*

CHAP. VI.

OF INCORPOREAL TENEMENTS.

Sect. 1.—*Of Seignories and Manorial Rights.*

Sect. 2.—*Of Equities of Redemption, and Equitable Charges.*

Sect. 3.—*Of Constructive Trusts, Equities, and Charges.*

Sect. 4.—*Of the Concurrent Jurisdiction of Courts of Equity with Courts of Law.*

APPENDIX.

ON THE PECULIAR LAWS OF IRELAND AND THE COLONIES.

TABLE

OF

ABBREVIATIONS.

Amb. - -	Ambler's Reports in Chancery, from 1737 to 1783.
Atk. - - -	Atkyn's Reports in Chancery, from 1736 to 1754.
Bac. Ab. -	Bacon's Abridgment of the Law, Gwillim's edition.
Bac. Tr. -	The Law Tracts of Lord Bacon.
B. & A. -	Barnewall and Alderson's Reports in B. R. from 1817 to 1822.
B. & C. -	Barnewall and Creswell's ditto, in continuation.
B & Ad. -	Barnewall and Adolphus's ditto, in continuation.
A. & E., or Ad. & Ell.	Adolphus and Ellis's ditto, in continuation.
B. & B. -	Broderip and Bingham's Reports in C. P. &c. from 1819 to 1822.
Beav. - -	Beavan's Reports in the Roll's Court, in continuation of Keen's.
Bing. - -	Bingham's Reports in C. P., in continuation of B. & B.
Bing. N. C.	Bingham's New Cases, in continuation of Bing.
B. & P. -	Bosanquet and Puller's Reports in C. P., from 1797 to 1804.
H. Bl. - -	Henry Blackstone's ditto, from 1788 to 1796.
Bl. or Bl. Rep.	Sir William Blackstone's Reports, from 1746 to 1780.
Bro. Ab. -	Broke's Abridgment of the Year Books, &c.
Bro. C. C.	Brown's Cases in Chancery, from 1778 to 1794.
Bull. N. P.	Buller's Law of Nisi Prius.
Bur. - -	Burrow's Reports in B. R. from 1756 to 1772.
Ca. t. Talb.	Cases in Chancery in time of Lord Talbot.
Co. - -	Coke's Reports.

Scriv. Cop.	Scriven on Copyholds, 2nd edition, 1823.
Sim. & Stu. or S. & S.	Simons and Stuart's Reports in the Vice-Chancellor's Court.
Sim. - -	Simons's ditto, in continuation.
Sch. & Lefr.	Schoale and Lefroy's Reports in Chancery in Ireland in time of Lord Redesdale.
Stra. - -	Strange's Reports, from 1716 to 1747.
Stark. Ev.	Starkie on Evidence.
Sugd. Pow.	Sugden on Powers, 3rd edition, 1821.
	Where cited by the Editor, it is the 6th edition, in 2 vols., 1836.
Sugd. Vend.	Sugden on Vendors and Purchasers, 6th edition, 1822.
	Where cited by the Editor, it is the 10th edition, in 3 vols., 1839.
Swanst. -	Swanston's Reports in Chancery, in 1818 and 1819.
Tau. - -	Taunton's Reports in C. B. &c. from 1807 to 1819.
Toll. Ex. -	Toller's Law of Executors and Administrators, 4th edition, 1818.
Touchst. or Shep.Touch.	Shepherd's Touchstone of Common Assurances. Preston's edition.
T. R. - -	Term Reports in B. R. by Durnford and East, from 1785 to 1800.
Turn. - -	Turner's Reports in Chancery, in 1822 and 1823.
Ventr. - -	Ventris's Reports in time of Charles 2, &c.
Vern. - -	Vernon's Reports in Chancery, from 1680 to 1716.
1 & 2 Ves.	Vesey's Reports in Chancery, from 1747 to 1755.
V. J. - -	Vesey, Junior's, Reports in Chancery, from 1789 to 1816.
V. & B. -	Vesey and Beames's ditto, in 1813 and 1814.
Vin. Abr. -	Viner's Abridgment.
Watk. Cop.	Watkins on Copyholds.
Wils. - -	Wilson's Reports in B. R. and C. B. from 1742 to 1769.
Wils. Fi. -	Wilson on Fines and Recoveries.

TABLE OF CASES.

When the case is cited by name, the page in which it is referred to only is given; when it is not cited by name, the place in which it is reported is in the same line with the name; and when it is referred to in one place by name and in another by the Report, the latter reference is immediately under the former.

(n. refers to an original note; *n*. to an additional note; and *m*. signifies an additional marginal reference.)

D.

F.

G.

H.

I.

J.

T.

The above Table of Cases, (except the present Editor's own additions,) has been adopted from the 2nd Edition of the work, which was printed subsequently to the Author's death. The original Edition contained no Table of Cases.

ADDENDA ET ERRATA.

p. 73, 2 lines from bottom, for "St. 27," read "St. 37."
84, at number 216, add a reference to St. 10 G. 4, c. 50, noticed at number 486.
91, in note, after "trust fund." add, "And hence a trust deed of this nature is not merely void as against a subsequent purchaser for valuable consideration, but the author of it may revoke it at his pleasure. The St. 27 Eliz. c. 4, it may be remarked, does not extend to settlements of personal property."
91, 6 lines from bottom, for "3 Keen," read "3 Mer."
92, at bottom of note, add, "The act is continued to January, 1843, by St. 3 & 4 Vict. c. 83."
105, 15 lines from bottom, for "s. 3," read "s. 8."
126, after "3 & 4 W. 4, c. 106," add, "which, however, does not apply to any descent, which took place before the 1st of January, 1834, (s. 11.)"
130, at bottom, add in margin, "[See Banbury Peerage, 1 S. & S. 153; Bury *v.* Phillpot, 2 My. & K. 349; Gibbs *v.* Hooper, ib. 353.]"
141, 8 lines from bottom, for "and," read "or."
143, 4 ————————, for "were," read "seem."
154, after the first clause of the note, add, "And by s. 34, it is declared, that at the determination of the period limited for making an entry or distress or bringing an action, the right and title of the party shall be extinguished."
173, in margin, read "[Doe *v.* Plowman, 2 B. & Ad. 557.]"
274, 4 lines from bottom, for "s. 13," read "s. 18,"
276, 6 ————————, for "s. 64," read "s. 59."
422, 3 ————————, for "3 & 4," read "2 & 3."
428, in note, add a reference to St. 3 & 4 Vict. c. 31, extending the powers of the former Acts.
458, 6 lines from bottom, for "St. 13," read "St. 31."
461, at number 1246, in margin, add, "But see 4 Bing. 295, 296, 297."
xxviii, read, "Mason *v.* Bogg, 546, *n.*"

The following marginal notes, which, with others, found their way, undistinguished, into the work, after the Author's death, escaped observation until after the sheets were sent to press.

p. 5, "Co. Litt. 19. a."
7, "Co. Litt. 496."
10, "Co. Litt. 54. a."
16, "2 Prest. Conv. 338."
86, "But see Co. L. 46. a. b."
95, "Hale Co. Litt. 44. a. n. 2."
127, "Co. Litt. 11. b. 15. b."
140, "Where seisin in deed of incorporeal tenement is not necessary, see Co. Litt. 13. b.; 29. a."
166, "Co. Litt. 48. b."
175, "See Barker *v.* Ray, 2 Russ. 63."
289, "But see Bacon's Tracts, 243."
293, "Co. Litt. 42. a."



AN

ELEMENTARY COMPENDIUM,

&c.

INTRODUCTION.

(1.) THE subjects of Real, as distinguished from Personal, Property in England, are commonly included under the general denomination of Lands and Tenements; and they are indeed all comprehended in the latter of those two words. (2.) Land, in its most confined legal sense, denotes arable ground; but it is also used to signify the surface and substance of the earth under all circumstances, though covered with water or buildings; and every thing which is permanently fixed to the land forms a part of it. (*a*) (3.) The word Tenement has also a * confined sense, in which it is ap-

Co. Litt. 4. a. 19 b. 20. a.

Touchst. 90.

Co. Litt. *ub. supr.* R. *v.* Inh. Tolpuddle. 4 T. R. 671

[(*a*) See further, as to general denominations of Real Property, (545. &c.) and in Chap. 6.]

* (3. *n*) It has also, in popular acceptation, a sense still more confined, as signifying a habitable building with its appurtenances. This usage of the word seems to have

propriated to the subjects of feudal tenure; but in general it includes not only land, but every modification of right concerning it, to which the law has attributed a substantive though invisible being. (4.) These incorporeal Tenements consist of a right, not to the possession of the land itself, but to some benefit to arise out of it. An absolute right to the land, existing separate both from the actual occupation, and from the established succession, must, like the claims of a monarch unjustly dethroned, be the result of some act of wrong; but partial and subordinate rights are the creatures of contract, and these have their specific characters and appropriate denominations in Law, by means of which they are vindicated and transferred. Such are Rents, Commons, Seignories, Tithes, Advowsons, Local Offices, and the like. (5.) The word Hereditament is still more comprehensive; for it is applicable not only to Lands and Tenements, but to some of the subjects of personal property, and to mere Rights, which imply a privation of property.

(6.) The Laws by which Real property in England is regulated are of four kinds, viz. the Common Law, Local Customs, the Rules and Usages of Courts of Equity, and the Statute Law. (7.) The Common Law, as it

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been occasionally adopted by the Legislature: see *R.* v. *Manchester and Salford Waterworks Company*, 1 B. & C. 630; but it is not strictly legal.

regards Real Property, has the old Feudal System for its foundation; and * the Judges of the Courts of Common Pleas and King's Bench have been its principal architects. Regarded in a mere historical view, the whole Common Law is aptly denominated the General Custom of the Realm; while in respect of the scientific principles which pervade it, it is said to be Reason itself, and the perfection of Reason. Many, however, of its rules were more reasonable when first established than they are now. It has been the constant labour of the Judges, through all the changes of society, to keep the Common Law consistent with reason, and with itself. These two objects have not always been found compatible; and sometimes one has been sacrificed and sometimes the other. Yet no candid learner can fail to appreciate, either the wisdom of the old maxims, or "the variety, almost infinite, of

Co. Litt. 115. b.

Co. Litt. 97. b.

Co. Litt. 395. a.

* (7. *n.*) See an excellent account of the origin of the Common Law in Hallam's Middle Ages, 2d vol. p. 465. (2d edit.) The expression above used may seem to attribute too much of a direct legislative authority to the Judges, which, however in fact exercised by them in former times, has never been formally asserted. The true idea of the Common Law seems to be that of an organized system, having its principle of growth within itself, and of which these officers are themselves a part. No new Law can ever proceed from them; but the old is by their means in a continual process of further development. Their business, in the most doubtful and unforseen cases, is still to consider the Law as already fixed, to discover, and to assert it.

" authorities, ancient, constant and modern " and withal their amiable and admirable con- " sent in so many successions of ages."

(8.) Local Customs are such exceptions to the rules of the Common Law as arise from the usage of particular places or districts, and are allowed or tolerated by that law.

(9.) The Rules and Usages of Courts of Equity form a system which may be regarded as a kind of secondary Common Law, applicable generally to matters in which the Courts of Law have no jurisdiction, but sometimes interfering with those Courts, and correcting the law which they observe. The system has been framed, or promulgated, almost entirely by the Chancellors of England, and the greater part of it within the two last centuries.

(10.) The Statute Law is the work of Parliament. This, as far as its operation extends, controls and supersedes all other laws; but this operation itself is, in some measure circumscribed and directed by the interpretations of the Courts of Law and Equity.

(11.) There may also be said to be three kinds of Property in Lands and Tenements, namely, Legal Property, Customary Property, and Equitable Property.

(12.) The degree of Property which a person has in Lands or Tenements, if sufficiently perfect, is called his *Estate*. I shall therefore treat first of *Legal Estates*, according to the following division:

(13.) All Estates are either Estates of Freehold or Chattels. Some Estates of Freehold are also of Inheritance, others not; and Estates of Inheritance are either in Fee Simple or Fee Tail.

(14.) An unqualified Estate in Fee, or Fee Simple, is that which gives its owner the fullest power of disposing of the Tenement which the Law allows, and not being disposed of by him, it descends to such of his kindred, however remote, as the Law marks out for his heir. (15.) But such an Estate may be qualified by a Condition or Limitation capable of abridging or defeating it; and then indeed it cannot with strict propriety, be called a Fee *Simple*.

Co. Litt. 1. b.

Co. Litt. 19. a.

(16.) An Estate in Fee Tail, (or *in Tail*, or an *Estate Tail*,) confers less ample powers of alienation: and in its descent is confined to the posterity of some individual, so as to cease upon failure of such posterity.

(17.) An Estate of Freehold only, as distinguished from an Estate of Inheritance, (for in the Inheritance the Freehold is included,) is limited to the duration of some person's life, or to some uncertain period included in such life, and not referred to the mere will of the next person in succession.

(18.) An Estate which is limited to a certain number of years, or other determinate time, is a Chattel; and, like other Chattels and Goods, or Personal Property in general, upon the death of the owner, instead of descending to his heir,

it devolves to the executors named in his will, or in default of such nomination, or upon their refusal to act, to the administrator appointed by an Ecclesiastical Court, which has jurisdiction for such purposes.

Co. Litt. 57. b.
1 Salk. 246.

(19.) An Estate or Tenancy for an uncertain period, referred to the mere will of the Tenant and of the next person in succession, and never extending beyond the life of the Tenant, may also be considered as a Chattel, and is called, according to circumstances, either an Estate or Tenancy at Will, or a Tenancy at Sufferance. *See* Touchst. 325. It confers no power of alienation.

3 East, 451.

CHAP. I.

OF ESTATES IN FEE SIMPLE.

SECT. 1.—*Of Alienation at Common Law.*

(20.) FOR some centuries before the reign of Henry 8, (when new modes of conveyance were introduced,) an Estate in Fee Simple in Land might be transferred from one person to another by the delivery of some symbol of possession, (as a turf, a wand, &c.) upon the Land, attended with apt words. This species of conveyance, which is still occasionally in use, is called a Feoffment. It now always consists of two distinct acts, namely, the ceremony above mentioned, which is called the Livery of Seisin (*a*); and the written explanation of it, signed by the Feoffor, (which is required by stat. 29 Car. 2, c. 3, called the Statute of Frauds.) This last is commonly in the form of a deed, (*i.e.* an instrument authenticated by the Feoffor's *seal*, and solemnly delivered to the Feoffee or to another person for his benefit,) and was not unusual in former times. (21.) The words necessary for effecting a transfer of the Fee Simple may be reduced to this short form: "I give this land to you and to "your heirs." The word *heirs* is so absolutely necessary for the purpose, that no other expres-

Co. Litt. 48. 49b.

Litt. 1.

[(*a*) This Livery must confer the actual immediate possession on the Feoffee. See below, (42, 70.)]

sion would serve; thus, if it were, "I give this "land to you," or "to you for ever," or even "to you in fee simple," the Feoffee would take only an estate for his life.

(22.) The effect of the Feoffment was always to confer some Estate of Freehold, either in actual possession, or only kept out of possession by a Chattel Interest preceding it. Its operation could not be suspended or deferred. For the law was anxious that it should always be matter of notoriety who was the present ostensible owner of the Land; that, if the rightful claimant were excluded, he might know against whom to bring his action, which could only be against the *Tenant* of the *Freehold* for the time being. (23.) And the better to ensure
Litt. 350. 351. the same object, it was also provided that, (unless in some few anomalous cases to which the rule was necessarily inapplicable,) the Estate given by the Feoffment should not afterwards
(15.) be defeated without some kind of solemnity. Accordingly, if the Feoffment had run thus, "I give this land to you and your heirs, on "condition that you pay me 10*l.* next Michael-"mas," or "on condition that* if I pay you

*(24.) A condition of this kind constitutes what is called a Mortgage, by which Real Property is pledged for securing the repayment of money. By the strict rules of the Common Law, all benefit of the condition is lost by a failure to make the payment by the stipulated day: but Courts of Equity will compel the Feoffee long afterwards to submit to a redemption, and to re-convey the mortgaged property.

" 10*l*. next Michaelmas the gift shall be void;" then, though upon breach of the condition in the first instance, and upon performance in the second, the Feoffor * would be entitled to re-enter upon the Lands and hold them as if no Feoffment had been made, yet without such re-entry the Feoffment would still continue in force.

(28.) If the gift were simply " to you for " your life," the Reversion in Fee Simple would remain in the Feoffor. But this consequence would be varied, if the gift were, " to you " for your life, and after your decease to *A*. " and his heirs;" or, " to you for twenty-one " years, and, subject to that estate, to *A*. and " his heirs;" or, " to you and the heirs of your " body," (which would constitute an estate tail,) " and upon your decease, and failure of your

Litt. 215; Co. Litt. 142. b. 143. a.

(16.)

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* (25.) Proper words for creating a Condition are " on condition that," " provided always that," " so that," or " but if it happen, &c., then it shall be lawful for " the Feoffor to re-enter." Litt. 328, 329, 330, 331. (26.) But conditions must be lawful, and not absolutely unreasonable. A Condition annexed to an estate in fee prohibiting all alienation is void. Co. Litt. 223. a. But it seems that the estate may thus be made inalienable for a certain time, or to a particular person. (1 Bac. Abr. 647;) or even, under some circumstances to all the world except one person. *Doe* v. *Pearson*, 6 East, 173. So a Condition not to marry a Scotchman, &c. has been allowed. *Perrin* v. *Lyon*, 9 East, 170. (27.) No person can take advantage of the condition but the Feoffor or his heirs. Litt. 347.

"issue, to *A.* and his heirs." In any of these three cases, *A.* would take an Estate in Fee Simple, giving him a right to the possession of the land upon the death of the Feoffee, or the expiration of twenty-one years, or the extinction of the Feoffee and his issue. But this Estate is not called a ***Reversion***, as the Land does not revert or return to the Feoffor, but a ***Remainder***, being the residue or remnant of the whole estate conveyed, after substracting the Feoffee's estate; (29.) which last, in relation to the Remainder, as in this, or to the Reversion, as in the former case, is called the ***Particular Estate****.

(31.) The Remainder, in the instances just given, is called a *Vested* Remainder, because the right to the future possession of the Land is

* (30.) The distinction between a Reversion and a Remainder is not merely nominal. All Land, by the Feudal System, is subject to some Lord, to whom services (whether valuable or not) are due from the owner; and no alienation by him can deprive the Lord of this inherent right, which is called his Seignory: but if the owner create a Particular Estate, and retain the reversion in himself, he becomes himself also a Lord of his own donee; for the donee is said to hold the land of him; and this secondary sort of Seignory is inseparable from the Reversion. On the other hand, if the owner make an alienation at once of the whole fee simple, he divests himself entirely of every feudal relation; and the Feoffee, though he have only a particular Estate, holds immediately of the Lord, and not of him to whom the Remainder is given. See chap. 6, sect. 1. The word *Reversion*, it may be observed, is sometimes used, though less properly, to signify such a right of future possession
Co. Litt. 54. a. as does not in the meanwhile amount to an *Estate*. See Plowd. 196. b.

already fixed in *A.* But there are other Remainders, which are called *Contingent.* Thus, if it were expressed that *A.* should have the Estate only in case *B.* returned from Rome; or if, instead of *A.* himself, the Remainder were given to his next-born son, or to any other person not yet ascertained, this would be a *Contingent Remainder.*

(32.) That these Contingent Remainders might not too much interfere with the object before mentioned, (the certainty and notoriety of present ownership,) they were subjected to two rules, which may both be resolved into this; "that whenever an ulterior Estate comes into "possession before the happening of the con- "tingent event, the Contingent Remainder "fails." (33.) Hence it is necessary "that a "Contingent Remainder of Freehold should "have a particular Estate likewise of Freehold "to support it." For if it have not, it must be supported by a Particular Estate which is not of Freehold, *i.e.* by a Chattel Interest; and then, while the contingency is in suspense, there must be an ulterior Estate of Freehold vested in some person, as otherwise there would be no vested Freehold at all, which the law will not allow. But to many purposes, and particularly to this, a vested Estate of Freehold expectant only on the determination of a Chattel Interest, is considered as an Estate in possession; so that here the ulterior Estate is in possession from the beginning. Thus if Lands be given to *A.* for twenty-one years, with Remainder to a person

(22.)

Purefoy *v.* Rogers, 3 Saund. 380.

(29. 13.)

(22.)

unborn for life, and a further Remainder to *C.* in fee; here *C.* may be considered as in possession from the first, and therefore the prior Contingent Remainder is void: and in like manner, if the Remainder to the person unborn had been in fee, though no ulterior Remainder could then have been given to *C.*, yet, that the Freehold may always be vested in somebody, a Reversion would have continued in the Feoffor; and this we may call the ulterior Estate which is already in possession, and so causes the Contingent Remainder to fail. (34.) Hence also it is necessary "that every Contingent Remainder should "become vested during the continuance of the "Particular Estate, or immediately upon its "determination;" for if not, the ulterior Estate then comes into possession.

Carter v. Barnadiston, 1 P. Wms. 505.

Co. Litt. 180. a. Litt. 280.

(35.) If the Feoffment first mentioned were made to two or more persons, and their heirs, the Feoffees would be *Joint-Tenants* in Fee Simple; (36.) that is they would hold the estate as companions, in a sort of partnership, of which the law is, that the survivors succeed, and the last survivor takes the whole, as if it had originally been given to him only, and his heirs; unless any of his companions may have conveyed away * his own share in his lifetime(*a*),

Co. Litt. 185. a.

* (36. *n.*) Each Joint-Tenant is said to be seised of the whole; but he cannot alien or forfeit more than his own share; and if all join in a Conveyance, each gives but his own part. Litt. 288; Co. Litt. 186. a.

[(*a*.) But he cannot dispose of his share by will. See below, (256.)]

which each is at liberty to do. (37.) But in this last case*, the person to whom that share was so conveyed will hold it as a *Tenant in Common* with the remaining original Feoffee or Feoffees; (38.) that is, he will have the same right to occupy the land as the rest, (who if more than one, will still be Joint-tenants among themselves, though Tenants in Common relatively to him,) and he will be entitled to the same share in its produce as the person was who conveyed to him; but upon his own death his share will descend to his heirs; and he will himself derive no benefit from the death of any of the original Feoffees. Such a conveyance, therefore, is called a Severance of the Jointure; and the Tenant in Common is not said, like the Joint-tenant, to be seised of, or to have a title to, the whole land, though the whole is in his occupation. Litt. 292. 294. Co. Litt. 189.a.

(39.) From what has been said it may be inferred, that a Reversion, or Remainder, though it may be created by Feoffment, cannot afterwards be transferred by the same mode of conveyance; for no one can have a Reversion, or Remainder, without a Particular Estate being

* (37. *n.*) And so if the original Feoffment had contained the words "to hold as tenants in Common, and not "as joint tenants," or "the one moiety to the one, and the other moiety to the other," the Feoffees would have been Tenants in Common instead of Joint-Tenants. (*a.*) And if the Feoffor had conveyed but a moiety, or other undivided share, of his land, he would have become Tenant in Common with his Feoffee. Litt. 298, 299.

[(*a*) See further below, (165, 1524.)]

vested in some other person. The Particular Estate is accompanied with the present right of possession; and therefore the Reversioner, or Remainderman, cannot in general lawfully make a Feoffment, which implies delivery of the possession to another. The old law therefore provided that such estates should be transferred by Deed of * Grant, a mode of conveyance which is also generally applicable to Incorporeal Tenements. (41.) An additional ceremony was indeed required for the transfer of Remainders and Reversions, and in some other cases; namely, an expression of assent by the Tenant

Litt. 615; Co. Litt. 9. a. 172. a. 332. a.

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* (40.) Hence a distinction, of much practical importance between things *lying in Livery,* and things *lying in Grant;* the former class comprehends land in possession, and also certain legal aggregates, of which lands in possession form the principal part, such as a Manor, consisting of Lands and Seignories, or a Rectory, consisting of Lands and Tithes; and of these it seems that the incorporeal part, though separately grantable by deed, will not be severed from the corporeal without an apparent intention; and therefore a Feoffment of the whole, if not completed by Livery of Seisin, will not have a partial operation as a Grant. Mo. 496. To the latter class, of things lying in Grant, belong all the subjects of real property which are alienable, except land in possession. (42.) The reversion expectant upon a lease for years lies in Grant, but it lies also in Livery; for a Feoffment may be made of it with the consent of the Tenant. (Co. Litt. 48 b. 52. a.;) and as this consent was equally necessary, by the old law, to the validity of a Grant, it is difficult to say which was the more appropriate mode of conveyance. Such a Reversion however appears in general to possess the properties of a thing lying in Livery rather than in Grant. Co. Litt. 332. b.

[Gardiner v. Williamson, 2 B. & Ad. 336; Bird v. Higginson, 2 A. & E. 696.]

[Doe v. Lynes, 3 B. & C. 388.]

of the land, which was called his Attornment: but this has been rendered unnecessary by the Stat. 4 Ann, c. 16, s. 9. (43.) Nothing more seems requisite, in point of verbal accuracy to the validity of such a Grant, than that the Deed clearly express the intention of the Grantor to convey; though the word *Grant* is certainly the most regular indication of such intention.

Cowp. 600; 5T.R.129.310.

(44.) Another mode of conveying Reversions and vested Remainders was by Deed of Release; but this could only be made to the Tenant or Owner of the Particular Estate. (45.) For a Release is always the Relinquishment of some right or benefit to a person who has already some interest in the Tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. (46.) Where nothing but a mere right, or perhaps a* Contingent Estate, is relinquished, the Release may be made to any per-

[Co. Litt. 267. a. n.(1.)Butl.]

Co.Litt.267.b. 1 Co. 113. a. 10 Co. 48. 51; 1Sand.Us.196.

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* (47.) He who releases must have "a right, or a foundation or original inception of a right;" and therefore an eldest son or heir apparent cannot, in the lifetime of his father, deprive himself, by Release, of his possibility of future right to his father's Fee. (48.) Also, "where there is uncertainty in the person, no release can be made;" and therefore the same person cannot release a contingent remainder given to "the heirs" of his father; for it is yet uncertain whether he will be heir. Nor can a contingent remainder "to the survivor of *A*. and *B*." be released by either of them in the lifetime of the other. 10 Co. 51 (*a*.).

[(*a*) As to the means by which such possibilities and future rights and contingent interests may be barred or transferred, see below, (79 *n*. &c.)]

son who has a vested Estate in the Tenement, whether in possession, reversion, or remainder, with this qualification only, that the right to an Estate of *Freehold* can only be released to a person whose estate is of that degree. (49.) And
Litt. 452. 472. such a Release, (unless indeed it be made to one of several joint-tenants, having no pretence of title but their own act of violence,) will operate for the benefit of all persons who are entitled to the Tenement by the same means as the Releasee. (50.) But where a vested Estate is relinquished, it must be either by one companion in estate to another, for which purpose they must
[317.] be more closely connected than tenants in common; (51) or by a person having a Remainder or Reversion, to a person having an antecedent vested Estate created by the same conveyance as that Remainder or Reversion. (52.) In this last case it is not necessary that the person to whom the Release is made should be in the actual possession of the Tenement, nor always that he should have the Estate *imme-*
Co.Litt.273.a. And see Bro. Abr. Rel. 71. 2 Prest. Conv. 338. *diately* antecedent to that of the Releasor. Thus, if Land be given by *C.* (tenant in fee simple,) to *A.* for twenty-one years, with remainder to *B.* for his life; *C.* may afterwards by Release tranfer his Reversion either to *A.* or *B.* In the former case it would still continue a Reversion expectant upon the death of *B.*; in the latter, the Remainder of *B.* would merge in the Reversion, which would then be immediately expectant on the determination of *A.*'s

Estate for years. (53.) But if *C.* had origi-
nally given the land to *B.* for his life, and *B.*
had afterwards made a lease to *A.* for twenty-
one years, then the release of *C.* to *A.* would
have been void for want of what is called Pri-
vity of Estate between the parties, which exists
only where both Estates were acquired by the
same conveyance, or the one derived imme-
diately out of the other. (54.) It would seem,
however, that in this case the Deed, though
purporting to be a Release, might be supported
as a Grant; and if so, it appears nugatory to (48.)
say that it is void as a Release, unless there be
some difference of operation between a Release
and a Grant. The distinction commonly made
is, that a Grant conveys the Reversion or Re-
mainder; but a Release *enlarges* the particular
Estate. It is clear, however, that in the case
stated above, where the estate of a third person
is interposed between the estates of the Re-
leasor and Releasee, no enlargement can take
place; and in other cases the practical effects 2 Sand. Us. 64.
of such enlargement are not much attended to,
or generally acknowledged. So that upon the
whole, perhaps, there would be no more than
a verbal inaccuracy in saying that a Release of
the kind last described is a species of Grant*.

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* (55.) It may be observed, however, that where a person has an estate which is removed from actual possession only by the occupation of another whom he has made Tenant at Will, and whom he may therefore remove when he pleases, he may make an effectual release of his

Co. Litt. 9. b. (57.) A Release from one Joint-Tenant in fee to another passes the whole estate without the word "heirs." But in all Grants, properly so called, and in those Releases of Reversions Litt. 468. and Remainders which resemble them, this word is as needful as in a Feoffment.

(58.) Besides the above enumerated modes of conveying the Freehold Interest and Inheritance, the law has always given the proprietor the power of demising or leasing his Tenement Co. Litt 85.a., Litt. 59. for any term or number of years. (59.) This, if the Tenement were incorporeal, or held in reversion or remainder, could only be done by deed; but with respect to Land in possession, neither a Deed nor Livery of Seisin was necessary. Litt. 324. (60.) *Seisin* indeed signifies the possession of the Freehold; and therefore where no Freehold was conveyed, no Seisin could in Co. Litt. 46. b. effect be delivered. (61.) But the lease had not its complete operation until the lessee had entered upon the land in pursuance of it. Before his entry, the land was indeed charged with the lease, and the lessee had such an interest *(Interesse Termini)* as he might transfer Co Litt 270. a. to another person; but until entry, this interest

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estate to such tenant (Litt. 460,) though he cannot grant the estate as a Reversion to a third person. 2 Sand. Us. 34. n. (56.) If the occupier be Tenant at Sufferance, i. e. if after the expiration of a lawful estate he continue in possession without any new contract, no Release can be made to him, for want of Privity of Estate. Co. Litt. 270. b.

did not amount to an *Estate*, nor, consequently, was the lessor's estate converted into a Reversion.

(62.) It appears that a lease for two or three year was sometimes made, and perfected by entry of the lessee(*a*), for the single purpose of his afterwards receiving a Release of the reversion. Thus arose a sort of compound conveyance, called a Lease and Release, which, if the Grantor were seised in fee simple, had the same effect as a feoffment. 2 Sand. Us. 61.

(63.) An Exchange of Lands might always be made without Livery of Seisin. But here it is necessary, 1st, that the estates exchanged be equal, *i.e.*, both Fees Simple, both Fees Tail, or both Estates for Life; 2nd, that the word *Exchange* be used, in which the whole force of the *Assurance is contained; 3rd, that each Co. Litt. 50, 51.

* (64.) To such Exchanges the Law has annexed the incidents of an implied *Warranty*, and an implied *Condition:* a Warranty, by which, if an action be brought (by a third person) against either party to the Exchange, or his heir, for the land received by that party in Exchange, he is enabled to *vouch*, or call upon the present owner of the land given in Exchange, to defend his right for him, and, if he shall be evicted, to restore that land in lieu of what he has lost; and a Condition, by virtue of which either party to the Exchange, or his heir, if lawfully deprived by a third person, (though without action,) of the land received by (22.)

[(*a*) Litt. 459. But see below, (131, 148, 149,) as to the means by which the necessity for an actual entry by the lessee is now avoided.]

party make an entry on his new property; for, if either die before entry, the exchange is void.

(66.) But all these Assurances yielded in solemnity and strength of evidence to Fines and Recoveries (*a*), in which the transfer of property was effected by the intervention, procured by the parties, of the Court of Common Pleas. And accordingly by Fine or Recovery a *Feme Covert* (or married woman,) may, with the concurrence of her husband, or as the law calls him, her Baron, convey her estate or

See Harg. Co. Litt. 121. a n. 1.

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that party in Exchange, may enter upon and resume the land given in Exchange, and enjoy it as if no Exchange
(15.) had been made. *Bustard's Case,* 4 Co. 121. (65.) But a mutual Conveyance of Lands, not having all the requisites of an Exchange, is not, without express stipulation, attended
(63.) by these consequences. Co. Litt. 204. a.

[(*a*) By st. 3 & 4 W. 4, c. 74, Fines and Recoveries are abolished after the 31st of December, 1833; except in cases where certain progress had been made in the regular proceedings of any Fine or Recovery on or before that day *;) and more simple modes of assurance are substituted, by which most of the purposes for which those cumbrous and artificial assurances were formerly used, may be effected. The principal provisions of this important act will be noticed at those parts of the work which seem most appropriate for their introduction.]

[* The Act also provides, (s. 2,) that where a person is liable, under a covenant or agreement made on or before that day, to levy a fine or suffer a recovery, he shall be liable to effect the same object by means of the assurances substituted by the Act; or, as far as that is impossible, by a Deed declaring his desire, that such Deed shall have the same operation as a fine or recovery would have had; and the Act gives to such Deed the necessary operation and effect for that purpose.]

relinquish her right; which she cannot do by Deed, from the supposed want of that free will, which the Court, on these occasions, by examining her separately, may ascertain to exist (*a*).

[(*a*) And now, by s. 77 of St. 3 & 4 W. 4, c. 74, a married woman, except where she is tenant in tail, (a case also provided for by the act,) is enabled, by deed, to dispose of land, and to dispose of, release, or extinguish, any estate or interest in land, as effectually as if she were a feme sole; but her husband must concur* in the deed, and the deed must be acknowledged by her as her act and deed, before a Judge of one of the superior Courts at Westminster, or a Master in Chancery, or two Commissioners†, (s. 79,) who, before receiving such acknowledgment, must examine her apart from her husband, and ascertain that she freely consents to such deed. (s. 80.)

The Judge, Master, or Commissioners taking the acknowledgment, must sign a memorandum of the acknowledgment, and of the previous separate examination of the married woman, and of her consent; the memorandum to be endorsed on, or written at the foot, or in the margin of the deed; and must also sign a certificate of the taking of such acknowledgment‡. (s. 84.)

This certificate, together with the affidavit of some per-

[* The concurrence of the husband may be dispensed with by order of the Court of C. P., on the application of the wife, in cases where he is, from lunacy or other cause, incapable of executing a Deed, or where his residence is unknown, or where he is in prison, or where he is living apart from his wife. (s. 91.)]

[† Perpetual Commissioners for this purpose are appointed from time to time by the Lord Chief Justice of the Court of Common Pleas, for the several districts of the country, (s. 81,) whose powers, however, are not confined to the particular district for which they may be appointed. (s. 82.)]

[‡ S. 84 provides the forms or effect of such memorandum and acknowledgment, subject to alteration from time to time by the Court of Common Pleas.]

(67.) The substance of a Fine is an agreement between the parties, enrolled amongst the Records of the Court, as the termination of a
Cru. Fi. 65. fictitious suit commenced for the purpose. This agreement is in form, either of an acknowledgment of a prior right (and that either with or without the suggestion of a former gift,) or it is in the form of a present grant. (68.) Hence the distinction between, 1st, Fines "Sur conu-"sance de droit come ceo qu'il ad de son don;" 2nd, Fines "Sur conusance de droit tantum;" and 3rd, Fines "Sur Concessit." The first of these is peculiary adapted to the transfer of a fee simple in possession; the second to that of a remainder or reversion; and the third to the creation of smaller estates, as for life, or years, though it may also be used to convey the fee simple. (69.) But the first is the most usual of all, and is often applied to remainders and

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son verifying the same, and the signature thereof, must be lodged with an officer of the Court of Common Pleas, (appointed for the purpose by the Lord Chief Justice, (s. 89,)) and must be by him filed of record in the said Court. (s. 85.)

When the certificate is filed, the deed shall take effect from the time of its being acknowledged. (s. 86.)

The officer is directed to keep an index of such certificates, containing the names of the married women and their husbands, alphabetically arranged, and other particulars. (s. 87.)

And he is to deliver a copy of any certificate signed by him, to any person applying for such copy; and such copy shall be received as evidence of the acknowledgment. (s. 88.)]

reversions, as well as estates in possession. The "don," or gift, which it supposes is understood to be (where the subject of transfer is land in possession,) a Feoffment in fee simple, made at some former time by the Conusor (as he is called) to the Conusee, of which the Fine is to be conclusive evidence. No date, however, being assigned for this Feoffment, it can only be considered as operating from the recorded date of the Fine; and the Fine itself is therefore said to be a Feoffment of Record. (70.) But it does not follow that such a Fine has always the same effect as an actual Feoffment would have; for the Livery of Seisin, when made in due form, is a virtual delivery of the land itself; and therefore (unless vitiated by fraud, or invalidated by the presence, in person, or by his family or servants, of the party entitled to the immediate possession, who nevertheless, if he have only a chattel interest, may by his consent make it effectual,) this Livery always operates to pass an estate, either by right or by wrong, or both. 1st. By right, as if the Feoffor be lawfully seised of the land for the estate which he conveys; (71.) 2nd. By wrong, if he have only a Chattel Interest, or if he turn out the proprietor, or find the possession vacant, having himself no right to enter; or (72.) 3rd. Partly by right and partly by wrong; if he be seised of a particular estate of Freehold, and convey the whole fee simple to the prejudice of him

(20. 42.)

[Shep. Touch. 213, Doe v. Taylor, 5 B. & Ad. 575.]

(42.)

Litt. 698, 699. 701. 611; Butl. Co. Litt. 330. b. n. 1.

who has the reversion or remainder, which is thereby displaced, or divested, and converted into a simple right. (73.) In the first and third of these cases a Fine of the first kind would have the same operation as the Feoffment; (74.) but not in the second. For though there may be, in such a Fine, a fiction or supposition of a Feoffment, there can be none of a totally unlawful Feoffment; nor even of an entry into the land by a person out of possession, for the purpose of making a lawful one. (75.) And therefore if *A.*, being tenant for life, or in fee simple, should be violently dispossessed of the land by *B.*, who, by such manifest usurpation or *disseisin*, acquires the fee simple himself: though *A.* has an unquestionable right to re-enter upon the land, and, if he pleases, to make a Feoffment to a third person, as *C.*; yet, without, such re-entry, a Fine "sur conu-"sance de droit come ceo." &c., from *A.* to *C.*, so far from conveying the land to *C.*, would only strengthen the title of *B.*, by extinguishing *A.*'s right. (76.) For the same reason, when a Fine of the first kind is used for the conveyance of a reversion or remainder expectant upon a particular estate of freehold, it will not operate like a Feoffment, so as to displace or divest the ulterior estate (if any) in reversion or remainder; but will have the same effect in that respect, as a Fine of the second or third kind, which would operate only as a grant of the Conusor's interest,

Goodright v. Forrester, 8 East, 552.

1 Salk. 340.

Harg. Co. Litt. 180. b. n. 7. (71.)

2 Co. 56. a. Weale v. Lower Pollexf. 54. See 1 Prest. Conv. 209; but 12 East, 154. n. *contr.*

Co. Litt. 49. a. & Hale, n. 4.

Co. Litt. 251. b. 1 Co. 76. a.; Rowe v. Power, 2 N. R. 1.

without invading or affecting the estate of any other person.

(77.) Most Fines at this day are transacted or levied, as it is called, according to the provisions of the Stat. 4 Hen. 7, c. 24, and their effect will best appear from the words of that Enactment, which (omitting some few passages which do not now concern us) are as follows:

" That after the ingrossing of every Fine to " be levied in the King's Court * afore his

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* (78.) The jurisdiction of the Court of Common Pleas does not extend to Lands situated in the Counties Palatine of Durham, Lancaster, and Chester, in Wales, or in the Isle of Ely, nor to those which are held of any Manor which appears by the Domesday Book of William the Conqueror to have formed part of the Ancient Demesnes of the Crown. All these districts have Courts of their own, in which Fines may be levied of such Lands (a); and the properties of a Fine levied in the Court of Common Pleas according to St. 4 H. 7, have been communicated, by St. 37 H. 8, c. 19, to those levied before the Justices of Assize at Lancaster; by St. 2 & 3 Edw. 6, c. 28, to those levied before the High Justice of the County Palatine of Chester, or his Deputy; by St. 43 Eliz c. 15, (for lands within the County of the City of Chester,) to Fines levied in the Portmoot Court of that City; by St. 5 Eliz.

[(a) A fine levied of lands lying out of the jurisdiction of the Court in which it was levied, was void. By s. 5 of St. 3 & 4 Wm. 4, c. 74, it is provided, that a fine or recovery of lands shall not be invalid in consequence of its having been levied or suffered in a Court whose jurisdiction did not extend to such lands.]

"Justices of the Common Place, of any Lands, "Tenements, or any other Hereditaments, the "same Fine be openly and solemnly read and "proclaimed in the same Court the same Term, "and in three Terms then next following the "same ingrossing, in the same Court* at four "several days in every Term; and in the same "time that it is so read and proclaimed, all "Pleas to cease. (79.) And the said Procla-"mations so had and made, the said Fine † to

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c. 27, to those levied before the Justices of the County Palatine of Durham; and by St. 34 & 35 H. 8, c. 26, s. 40, amended by St. 5 G. 4, c. 106, s. 26, to those levied before the Justices of Wales.

* (77. *n.*) By St. 31 El. c. 2, these Proclamations are to be made only once in each term.

† (79. *n.*) The effect of a Fine between the Parties themselves, and their respective representatives, (as Grantees by conveyance subsequent to the Fine, or Heirs claiming an estate in fee simple by descent, all of whom are included under the denomination of *privies,* (80.) is so strong, both by this Statute and by the old Common Law, that though neither of the parties have any estate in the Tenement at the time, yet the Fine will for ever bind any estate in it which the Conusor may afterwards acquire, and so give the Conusee or his heirs a title to it. *Helps*
(75.) v. *Hereford,* 2 B. & A. 242. But it is to be observed, (as was hinted before,) that if the Conusor, at the time of the Fine, have a right to, or contingent interest in, the tenement, not amounting to an actual vested estate, the Fine, if it purport to convey the fee simple, will extinguish this right or contingent interest (*a*), (for it is incapable of

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[(*a*) But see below, (82.)]

" be a final end, and conclude as well Privies as

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being transferred to a stranger;) and this extinction will be for the advantage of any person who has an actual estate in the Tenement. (81.) But a fine "Sur Concessit," purporting to create a particular estate, as a term of years, instead of *extinguishing*, would *bind* the right or interest for the benefit of the Conusee. *Weale* v. *Lower*, Pollexf.
54. (82.) The mere possibility of succession which an (47.)
heir apparent has, in the lifetime of the person on whose death the estate may descend to him, is not such an interest as can be so *extinguished;* for the descent, if not prevented by other circumstances, will take place, notwithstanding a Fine "sur conusance," &c. previously levied by the heir; and the estate, passing as it were through him, will
settle in the Conusee; and the same rule has been thought (48.)
applicable to a Contingent Remainder, when the person in whom it may vest is not yet ascertained(*a*). *Vicke* v. *Edwards*, 3 P. Wms. 372. (83.) This forestalling operation is common in some degree to certain other instruments, which are said in similar circumstances to work by *Conclusion* or *Estoppel*(*b*). Thus a Feoffment will also bind the future

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[(*a*) It seems to be now settled, that a fine *come ceo, &c.* levied by a contingent remainder man in fee, does not extinguish or destroy the remainder; but operates, in the first instance, during the contingency, by estoppel; and on the happening of the contingent event, the estate which then becomes vested *feeds the estoppel;* so that the fine operates on the estate, as though the estate had been vested in the Conusor at the time when the fine was levied. *Doe* v. *Martyn*, 8 B. & C. 497; *Doe* v. *Oliver*, 10 B. & C. 181.]

[(*b*) See on this subject the late case of *Bensley* v. *Burdon*, 2 Sim. & Stu. 519, and S. C. on appeal; (not yet reported;) but see the grounds of the Lord Chancellor's judgment in affirming the decree, stated in *Right* v. *Bucknell*, 2 B. & Ad. 282. See too the case of *Right* v. *Bucknell*,

" *Strangers to the same, (86.) except Women
" Covert (other than have been parties to the

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estate of the Feoffor; but, it seems, during his own life only, (Litt. 667; Co. Litt. 265; 3 T. R. 371,) while a Fine would be equally binding on his heir. And indeed such an operation appears to be most peculiarly the attribute of a Fine, of which the whole effect is originally derived from the conclusiveness of the evidence which it affords, and the very name seems to be taken from its being, as the Statute expresses it, " a final end" to all questions concerning the property between the parties and their representatives. (84.) It is to be regretted, however, that the Form of this assurance is so ill adapted to its purpose, and so incapable of variation, that in most cases a secondary instrument is necessary for its explanation. Thus, if a man have two closes in one Vill or Township, and he wish to levy a Fine of one of them, the description in the Fine will merely represent the land as so many acres of Land, (meaning arable land,) Meadow, Pasture or Wood in that Vill; but to ascertain which of the closes is to pass, if both be of the same quality, a Deed will be necessary, Cru. Fi. 153, 154; 2 Ventr. 32. (85.) So if it be intended that the estate should be subject to a Condition, this cannot be inserted in the Fine, but must be contained in a precedent Deed. *Lord Cromwell's Case*, 2 Co. 69. So that in fact the Assurance to which the law attributes the most absolutely conclusive operation is controlled by a less solemn and authentic instrument; a remarkable instance of the inconvenience of adhering too scrupulously to ancient forms.

* (79. *n.* 2.) *i. e.* such persons as are neither parties nor privies to the Fine.

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2 B. & Ad. 278, and Sir Edward Sugden's observation on that case, and on the case of *Bensley* v. *Burdon,* 3 Sugd. Vend. & Purch. p. 423, n. (1); and see below (850).]

" said Fine), and every person then being
" within age of twenty-one years, in Prison, or
" out of this Realm, or not of whole mind at the
" time of said Fine levied, not parties to such
" Fine; (87.) and saving to every person or
" persons, and to their heirs, other than the
" *Parties in the said Fine, such Right, Title,
" Claim and Interest, as they have to or in the
" said Lands, Tenements or other Heredita-
" ments, [at] the time of such Fine ingrossed;
" so that they pursue their Title, Claim or Inte-
" rest by way of Action, or lawful entry, within
" five years next after the said Proclamations
" had and made: (89.) And also saving to all
" †other persons such Action, Right, Title,

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* (88.) From this Saving, and that which follows, not only the Parties and their heirs but all Privies are in effect excluded. For not having any right at the time when the Fine is ingrossed (by which must be understood the time appearing on the Record,) they cannot derive any benefit from the first Saving; and their claim being founded on a matter not prior, but subsequent to the Fine, they cannot be brought within the conditions of the second. The exceptions, therefore, apply to strangers only. (79. *n.*) (69.) (79 *n.* 2.)

† (90.) It would seem, from the word "other," here used, that a person included in the first Saving could not take advantage of the second. But this is not universally true; for there are some rights which the law allows the party to *waive* or neglect, without prejudice to his ulterior right. Thus, when a Tenant for life levies a Fine, it operates as an immediate forfeiture of his estate, if the person in remainder or reversion choose to take advantage of it; but does not preclude him, if he suffer five years to elapse, from making his claim within a new period of five

" Claim and Interest in or to the said Lands, " Tenements or other Hereditaments, as first " shall grow, remain, or descend or come to " them after the said Fine ingrossed and Pro- " clamation made, by Force of any Gift in the " Tail, or by any other cause or matter had and " made before the said Fine levied; so that they " take their Action, or pursue their said Right " and Title, according to the Law, within five " years next after such Action, Right, Title, " Claim or Interest to them accrued, descended, " remained, fallen or come: (91.) And if the " same persons, at the time of such Action, " Right and Title accrued, descended, remained, " or come unto them, be Covert de Baron, or " within Age, in Prison, or out of this Land, or " not of whole mind, then it is ordained, That " their Action, Right and Title be reserved and " saved to them and their Heirs* unto the time " they come and be at their full age of twenty-

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years to be computed from the death of the Conusor. *Laund* v. *Tucker*, Cro. El. 254; 3 Co. 78. b.

* (92.) It is observable that no provision is here made for the case of a person dying under any of these disabilities; in consequence of which some have supposed that his heir may make his claim at any distance of time; but it has been decided that he also is confined to five years. *Dillon* v. *Leman*, 2 H. Bl. 584. (93.) If a person having right, recovers from all disabilities, and in less than five years dies, his heir, though an infant, or otherwise disabled, will not be allowed a new period of five years. *Doe* v. *Jones*, 4 T. R. 300. " When once the statute begins to run, nothing stops it." 4 Tau. 830.

" one years, out of Prison, within this Land, " uncovert, and of whole mind, so that they or " their Heirs take their said Actions, or their " lawful entry, according to their Right and " Title, within five years next after that they " come and be at their full Age, out of Prison, " within this Land, uncovert, and of whole " mind, and the same Actions pursue, or other " lawful entry take, according to the Law. " (94.) And also it is ordained, That all such " persons as be Covert de Baron, not party to " the Fines, and every person being within age " of twenty-one years, in Prison, or out of this " Land, or not of whole mind, at the time of the " said Fines levied and ingrossed, and by this said " Act afore except, having any Right or Title, " or cause of Action, to any of the said Lands " and other Hereditaments, that they, or their " Heirs, inheritable to the same, take their said " Actions or lawful Entry according to their " Right and Title, within five years next after " they come and be of Age of twenty-one years, " out of Prison, uncovert, within this Land, " and of whole mind, and the same Actions " sue, or their lawful Entry take and pursue, " according to the Law. And if they do not " take their Actions and Entry as is aforesaid, " That they and every of them, and their Heirs " and the Heirs of every of them, be concluded " by the said Fines for ever, in like form as " they be that be parties or privies to the said " Fines. (95.) Saving to every person or per-

"sons, not party or privy to the said Fine, "their * Exception to avoid the same Fine, by

* (96.) If none of the parties have any estate of Freehold (in possession, reversion or remainder) in the Tenement at the time of levying the Fine, such Fine is absolutely void as far as strangers are concerned, (though it is
(80.) valid between the parties and their representatives by way of Estoppel.) (97.) It has, however, been held that where there were two conusors, one of whom had the actual possession, but only as Tenant at Will to a Disseisor, while the other had a right to the Freehold which he might have enforced by entry, this combination of wrongful possession with the right of immediate seisin was sufficient to give effect to the Fine. *Carter* v. *Barnardiston*, 1 P. Wms. 505. 520. (98.) There is also another exception, by which, though not expressed in the Statute, a stranger may be exempted from the operation of the Fine. Thus if *A.* be Tenant for life, with remainder to *B.* for life, with remainder over to *C.* in fee, and *B.* levy a Fine to *Z.*, or *Z.*
(76.) to *B.*, this cannot disturb the possession of *A.* or the remainder of *C.*; and therefore, as *A.* may continue to enjoy his land in total unconcern, so neither is *C.* obliged to take possession or make his claim within five years after the death of the survivor of *A.* and *B.* *Smith* v. *Packhurst*, 3 Atk. 135; *Rowe* v. *Power*, 2 N. R. 1. (99.) For it is a certain rule, and founded on manifest reason, that no Fine will bar any estate which is not either before or by the Fine divested out of the owner, and converted into a right. 9 Co. 106. a. (100.) And on the same principle, if one of two Joint-tenants levies a Fine of the whole land to a third person, this will not, either immediately, or consequently upon five years non-claim, deprive the other Joint-tenant of his share; for the possession of one such Tenant is, by implication of law, the possession of his companion too; which implied possession, though it may be put an end to by visible acts of violence, is proof against the mere pretence and fiction of a Feoffment. The Fine, there-

"that, that those which were parties to the "Fine,* nor any of them,† nor no person or

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fore, though it purports to convey the whole land, will pass only the Conusor's share. *Ford* v. *Lord Grey*, 6 Mod. 44; 1 Salk. 285; see, however, 2 Atk. 631. And the same rule is applicable to Tenants in Common. *Reading* v. *Roystod*, 2 Salk. 423; Cro. El. 640.

* (101.) It is is therefore sufficient for establishing the validity of the Fine, if the Conusee had an Estate of Freehold, though the Conusor had nothing. Co. Fi. 22; 1 Burr. 95; Bro. Abr. Fine, 12.

† (102.) By Stat. 1 Rich. 3, c. 1, persons entitled in equity to the produce of lands of which the legal estate is vested in their Trustees, (of which more hereafter), are enabled to convey the lands themselves without the concurrence of those Trustees. Accordingly it was provided in the present statute, that the Fines of such persons should not be void for want of a legal estate vested in them. And in consequence of this provision it became usual for strangers who would take advantage of the Exception saved to them by the statute, to plead that "the parties to "the Fine had nothing *in possession nor use*." *Lord Sandes's Case*, Dyer, 215. The Statute of Rich. 3. has been virtually repealed by the Statute of Uses hereafter mentioned, and therefore this form of pleading is now improper. See *Bac. Tracts*, 304. (103.) But it has been made use of in argument to support an opinion, that unless one of the parties has an estate of freehold in possession, the fine is void as to strangers. 2 N. R. 24. And this notion has been carried so far that in one case the Fine *come ceo*, &c. of a person having a remainder in tail was said to operate only by way of estoppel. *Doe* v. *Harris*, 5 M. & S. 326. But it seems clear that such a Fine operates by way of grant; (2 N. R. 32; 3 Co. 90. a.) and the word "possession," in the form of pleading is used in contradistinction to "use" and not to remainder or reversion. That the Fine of one who has a reversion in fee ex-

" persons to their use, nor to the use of any of " them, had nothing in the Lands and Tene- " ments comprised in the said Fine at the time " of the said Fine levied. (104.) And it is or- " dained, that every Fine which hereafter shall " be levied in any of the King's Courts of any " Manors, Lands, Tenements, and other posses- " sions, after the manner, use and form that " Fines have been levied afore the making of " this Act, be of like force, effect, and autho- " rity as Fines so levied be or were afore the " making of this Act, this Act or any other Act " in this present Parliament made or to be made " notwithstanding. And every person shall be " at liberty to levy any Fine hereafter at his " pleasure, whether he will after the form con- " tained and ordained in and by this Act, or " after the manner and form aforetime used."

(105.) A recovery is a conveyance or assurance by means of an Action brought by the intended Grantee either originally against the Grantor, or against another person in such manner as to implicate the Grantor in the proceedings, and so conducted that, for want of a sufficient defence, Judgment is given against
(22.) the Grantor. (106.) This Action ought properly to be brought in the first instance against

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pectant upon an estate for life will bar strangers who do not make their claim within five years, is clear from Co. Litt. 298. a.; and *Salvin* v. *Clerk*, Cro. Car. 156. And see Shep. Touch. 13.

the person who has the first estate of Freehold in the Tenement, whether this estate be immediate or subject to a preceding chattel interest. For such a person is required by Law to be the defendant in all Actions where an estate of Freehold is the thing directly in demand; and it is principally for this reason that the Freehold is never allowed to be in suspense or abeyance, lest the assertion of Right by Action should be suspended too. (107.) However, a Recovery which is defective in this respect will be a good conveyance of the Fee, by way of Estoppel, if other requisite forms are observed; for the defect cannot be alleged by or in favour of the Recoveree *, or those who claim merely as his representatives. (109.) More will be said of this species of Assurance in the Chapter on Estates Tail, to which it is peculiarly appropriated; but it may be here observed that as it differs in many respects, in point of effect, from a Fine, so also its formalities are such that it can only be transacted in Term, while the Court is sitting; (110.) whereas the essential part of a Fine being the acknowledgment of the parties, which can be taken at any time by Commis-

Doe v. Bp. of Llandaff, 2 N. R. 491.

* (108.) The termination *ee* in other words marks the dative or accusative case; here it denotes the ablative: which is a consequence of the name and nature of the Assurance, in which the person to whom it is made appears to be the active party, and is styled the Recoveror; while the Recovery is said to be *suffered* by him from whom the estate passes.

sioners, it may be completed in Vacation, and recorded as of the preceding Term. (111.) A Fine cannot be levied by Attorney or deputy; but a Recovery may be suffered by Attorney, whose warrant appears upon the Roll; and if the Recoveree be an Infant, or insane, this warrant (though made with the same solemnity as the acknowledgment of a Fine out of Court) will be void, and will vitiate the Recovery; as would also the death of the Recoveree before the Attorney had executed his authority.—(112.) Both Fines and Recoveries are considered as commencing their operation (unless in some special cases) on the first day (called the Essoign Day) of the Term in or of which they are recorded; for the compromise is supposed to be made, or the Judgment given, on the same day that the Sheriff is represented to have returned into Court the Writ on which the fictitious Action, or the last proceeding in it, is grounded. (113.) Lands lying in two Counties cannot be included in one Writ, and therefore not in the same Fine or Recovery (*a*).

Cru. Rec. 108. 181.

(69.)

Cru. Fi. 59; Cru. Rec. 123.

Cru. Fi. 39.

[(*a*) Formerly it was the practice to have as many writs of covenant as there were counties, but to unite all the subsequent proceedings, and to allow the parties to levy but one fine. See *Gill* v. *Yeates*, 4 Taunt. 708. By a more recent regulation, a distinct fine for each county was required. 1 Rep. R. P. Commissioners, pp. 35, 36.]

SECT. 2.—*Of Alienation under the Statute of Uses.*

(114.) It was said that in the Reign of Hen. 8, new modes of conveyance were introduced. Some time before that reign the Court of Chancery had begun to exercise a jurisdiction over Land, by virtue of its own power, as a Court of Equity, and through the inability of the Courts of Law, to compel the conscientious performance of Agreements, and the execution of Trusts; insomuch that the rules of that Court, through that sort of subordinate and almost unperceived legislative authority, which a much-respected Court of Justice always obtains, had formed themselves into a regular system relating to Equitable Estates. (115.) Thus if a Feoffment were made "to *A*. and his heirs, *to the use* "of *B*. and his heirs," it was understood that though *A*. was to be the ostensible proprietor of the Land for its defence in a Court of Law, and for conveying a Legal Estate to any person to whom *B*. might wish to make over the property, yet *B*. was to be the owner in all other respects. and to have the whole benefit of the land. (116.) In the same manner, if *A*., being the actual proprietor of land, had made an Agreement with *B*., that the land should be his, then, provided there appeared a sufficient mo- (20.)

Bacon on Uses, Tracts, 307.

tive or consideration for such an Agreement,
Bac. Tr. 310. the Court of Chancery would consider *A.* as
holding the land *to the use of B.*, exactly as in
the former instance. (117.) The considerations
which were thought sufficient for giving ob-
ligatory validity to such Agreements were of
2 Sand. Us. 46. two kinds; they consisted either of money (or
money's worth,) or of the affection which the
2 Sand. Us. 81. party had for his wife, or any of his relations,
or (which was considered of the same kind)
the inducement of his own or his relation's
intended marriage. Hence, besides the decla-
rations of Uses inserted in Feoffments, Grants,
and Releases of Estates, and made to accom-
pany Fines and Recoveries, in which they could
not be inserted, there arose two new modes
of conveyance, which, though disregarded by
the Courts of Law, were operative in Equity;
viz. (118.) a Bargain and Sale for a valuable
Bac. Tr. 150. 336. 344. consideration, which it seems might be made
without writing; (119.) and a Covenant to stand
seised to the use of a relation, or of a wife actual
or intended, which required the solemnity of a
1 Sand. Us. 64. Deed. (120). The rules relating to Uses or
Equitable Estates were in many respects con-
formable to those of Estates at Law; but in
some points they differed. In particular the
Bac. Tr. 328. Use might be disposed of by Will, though the
laws then in existence did not allow of a tes-
tamentary disposition of land; (121.) and
whether the use were so disposed of, or by an
agreement *inter vivos*, there seems to have been

no regular form prescribed according to which the interest should be modelled. The forms which modern Settlements, grounded on the same principles, have assumed, are at least sufficient to prove that it might lawfully be stipulated that the Transfer should not take effect until the happening of some event, or the expiration of some period; so that in the mean while the Use might remain in the present proprietor or belong to a third person. Thus, *A.* might make a Feoffment to *B.* and his heirs, to the use of *A.* himself (or, it may be supposed, of *B.* or any other person) and his heirs, provided, that if a certain intended marriage should take effect the land should then be held to the use of *C.* and his heirs. So *A.* might covenant to stand seised to the use of himself and his heirs until his brother should marry, and then to the use of him and his heirs. (122.) The interest thus given to *C.*, or to *A.*'s brother, differed from a Contingent Remainder, not only as an Equitable necessarily differs from a Legal Estate, but also in this, that instead of depending on a preceding particular estate, and coexisting with it as an ulterior part of the same Fee Simple, it sprang up independently at a distance of time, in defiance rather than evasion of the rule, that the operation of every Conveyance must be immediate; or at least, if it did depend upon a particular Estate, it was upon one of a new kind, unknown, as such, to the Law; namely, a Fee Simple of limited

Bac. Tr. 313, 314.

Bac. Tr. 337. 1 Sand. Us. 136. 143.

duration, which the Common Law might allow to subsist by itself, but would by no means admit of a Remainder after it, because a Fee Simple was the greatest possible Estate; and whatever qualifications might be annexed to it, it was a Fee Simple still. But without regard to such technical scruples, it was settled, that in Equity a deferred or future interest might be created in the first instance; the Grantor retaining, or a third person taking, not a particular Estate, as for a certain number of Years, for Life, or in Tail, but the entire Inheritance, determinable only on the happening of that event (if it happened at all,) upon which the future interest (called a Springing or Shifting

Sudg. Pow. 4. 122.

Use,) was to arise. (123.) By a farther departure from the rules of the Common Law, the Grantor was allowed, in the instrument or act of transfer, to reserve to himself, or give to any other person, a power of revoking or annulling at his pleasure all or any of the Uses or Equitable Estates originally created, and also of new modelling the Equitable Property in any manner, and bestowing it upon any person to whom it might, under the circumstances of the Transfer, have been given in the first instance. (124.) I say to whom it might have been given in the first instance; because, unless a conveyance of the Legal Estate to a Trustee formed part of the original transaction, the Use could not, either immediately, or by virtue of a power then reserved, be given to any

person from whom the Consideration of the Agreement did not proceed. But where there was such Conveyance no Consideration was necessary, the Use being so severed from the Legal Estate as to be at the Grantor's absolute (23. 37.)
disposal. (125.) By means of a *Condition*, as we have seen, the Grantor or his heirs might, at Common Law, defeat the Conveyance; but by means of these equitable powers, according to the extent and objects for which they were expressly given, the person designated for that purpose might either defeat or modify, transfer, and vary, in every imaginable way, all or any of the Equitable Interests which the Conveyance originally described and limited.

(126.) Besides these deviations from legal analogy, and compliances with convenience, the Court of Chancery proceeded a step farther, Bac. Tr. 317. 1 Sand. Us. 103, 104.
and decided, that wherever a conveyance was made without an apparent Consideration, or with a Consideration apparently not extending to the whole Fee, and without any, or with an imperfect, declaration or intimation of Uses, it must be presumed to be made entirely, or so far as neither the declaration or intimation, nor the Consideration extended, to the use of the Grantor himself; and the Interest thus returning by presumption of Equity to the Grantor was called a Resulting Use.

(127.) Thus matters stood, when the Stat. 27 Hen. 8, c. 10, (commonly called the Statute of Uses,) was passed, which, by a sudden and

strong effort of legislative power, converted Equitable into Legal Estates. This Statute, after a long preamble, in which the inconveniences of separating the true from the ostensible ownership are enumerated, enacts in its three first sections as follows:

(128.) 1. "That where any person or per-" sons stand or be seised, or at any time here-" after shall happen to be * seised, of and in " any honours, castles, manors, lands, tene-" ments, rents, services, reversions, remainders, " or other hereditaments, to the use, confidence " or trust of any other person or persons, or of " any † body politic, by reason of any bargain,

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(60.) * *Seised.* (129.) This word is very material; for being appropriated to Estates of Freehold it excludes all chattel interests of which a man is properly said to be possessed, but not *seised;* and therefore if land be given to any person for a term of years, in trust for another, this Statute does not apply. Bac. Tr. 335.

† *Body Politic.* (130.) Or Corporation, which is an artificial person, the creature of Policy and Law. Corporations are either *aggregate,* as the Mayor and Burgesses of a Town, Masters and Fellows of a College, &c.; or *sole,* as a Bishop or Parson, and his successors. If land be given to a Bishop, &c. and it be intended that it should vest in him in fee simple in his corporate capacity, it must be expressed to be given, not to him and his heirs, but to him and his successors. The word *successors,* however, is not necessary on a conveyance in fee simple to a Corporation Aggregate. Co. Litt. 8. b.

It is observable, that though mention is made in the Statute of Uses of persons being seised to the use, &c. of Bodies Politic, nothing is said of Bodies Politic being

" sale, feoffment, recovery, covenant, contract, " agreement, will or otherwise, by any manner " or means, whatsoever it be, that in every " such case all and every such person and " persons, and bodies politic, that have or " hereafter shall have any such use, confidence " or trust, in fee simple, fee tail, for term of " life or for years, or otherwise, or any use, " confidence or trust, in remainder or reverter, " shall from henceforth stand and be seised, " deemed and adjudged * in lawful seisin, " estate and possession of and in the same " honours, castles, manors, lands, tenements, " rents, services, reversions, remainders and " hereditaments, with their appurtenances, to " all intents, constructions, and purposes in the " law, of and in such like estates as they had " or shall have in use, trust or confidence of or " in the same; (132.) And that the estate, " title, right and possession that was in such

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seised to the use of others; and it seems that before the Statute such Bodies were not thought capable of being Trustees. It follows, that if lands are given at this day to a Corporation upon any trust, this Statute does not interfere. Bac. Tr. 334; 1 Sand. Us. 89.

* *In lawful Seisin, Estate, and Possession.* (131.) By force of these words, and those which follow to the same (61.) effect in this section, the difference between an immediate *Interesse Termini* and an Estate for years is abolished, wherever such an estate is created by way of Use; for the interest is made an estate by the Statute, without the pre-requisite of an actual entry. *Lutwich* v. *Mitton*, Cro. Jac. 604.

" person or persons that were or hereafter shall " be seised of any lands, tenements or heredi- " taments, to the use, confidence or trust of any " such person or persons, or of any body " politic, be from henceforth clearly deemed " and adjudged to be in him or them that have " or hereafter shall have such use, confidence " or trust, after such quality, manner, form, " and condition, as they had before, in or to " the use, confidence or trust that was in them.

(133.) 2. " And be it further enacted, by the " authority aforesaid, * That where divers and " many persons be or hereafter shall happen to " be jointly seised of and in any lands, tene- " ments, rents, reversions, remainders, or other " hereditaments, to the use, confidence or trust " of any of them that be so jointly seised, that " in every such case that those person or persons " which have or hereafter shall have any such " use, confidence or trust in any such lands, " tenements, rents, reversions, remainders or he- " reditaments, shall from thenceforth have and " be deemed and adjudged to have only to him

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* *That where divers, &c.* (133 *n.*) It may be doubted whether the case here stated was not fully provided for by the words of the first section. The doctrine that each (36. *n.*) joint-tenant is seised of the whole land must have suggested the caution of this separate clause, in which it is enacted, not only that the joint-tenant who enjoys the use shall have the estate, (which it might be said he had already,) but that he shall have it *only to him*. Lord Bacon says the clause is rather an explanation than an addition. Tracts, 340.

" or them that have or hereafter shall have any " such use, confidence or trust, such estate, " possession and seisin of and in the same lands, " tenements, rents, reversions, remainders, and " other hereditaments, in like nature, manner, " form, condition and course, as he or they had " before in the use, confidence or trust of the " same lands, tenements or hereditaments; " (134.) * Saving and reserving to all and " singular persons and bodies politic, their heirs " and successors, other than those person or " persons which be seised, or hereafter shall be " seised, of any lands tenements or heredita- " ments, to any use, confidence or trust, all " such right, title, entry, interest, possession, " rents and action, as they or any of them had " or might have had before the making of this " Act.

(135.) 3. " And also saving to all and sin- " gular those persons, and to their heirs, which " be or hereafter shall be seised to any use, all " such former right, title, entry, interest, pos- " session, rents, customs, services and action, as " they or any of them might have had to his or " their own proper use, in or to any manors, " lands, tenements, rents or hereditaments, " whereof they be or hereafter shall be seised " to any other use, as if this present Act had

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* *Saving and reserving*. (134 *n.*) It seems to have been by some mistake of transcribers that the third section was not made to commence here. Both savings certainly apply equally to all that has gone before.

"never been had nor made; any thing con-"tained in this Act to the contrary notwith-"standing."

(116, 117, 118, 119.) (136) From what has been said, and from the tenour of this Statute, it will easily occur to the reader, that a Bargain and Sale for pecuniary Consideration, and a Covenant to stand seised to the use of a wife or relation, are at this day perfect Conveyances of Lands or Tenements; for the Deed or Agreement gives the Use, and the Statute immediately adds the Legal Estate. (137). In the same manner, when any of the old Common Law Assurances, by which the seisin is transferred, as a Feoffment, Grant, Lease and Release, Fine or Recovery, is accompanied with a declaration of Uses, the Legal Estate follows that declaration; (138.) And if there be no such declara-
(126.) tion, and no Consideration for the Conveyance, as the Use would before the Statute have resulted to the conveying party, so now will the Legal Estate immediately return to him.

(22.) (139.) It was a favourite object of the Common Law, as before observed, that property in Land, and therefore that every transfer of it, should be open and notorious; and the secret nature of Uses occurs in the Preamble to the Statute, as one of the principal inducements to their abolition. Yet the effect of that Statute was, that such property might be legally and entirely transferred by a secret transaction, without any formality of giving or taking pos-

session, and even without the evidence of any lasting document. To remedy this oversight it was enacted in the same session, by Statute 27 H. 8, c. 16,

"That no manors, lands, tenements, or other "hereditaments, shall pass, alter or change "from one to another, whereby any Estate of "Inheritance or Freehold shall be made or take "effect in any person or persons, or any Use "thereof to be made, by reason only of any "Bargain and Sale thereof, except the same "Bargain and Sale be made by writing in-"dented, sealed, and enrolled in one of the "King's Courts of Record at Westminster, or "else within the same county or counties where "the same manors, lands or tenements so bar-"gained and sold, lie or be, before the Custos "Rotulorum, and two Justices of the peace, "and the clerk of the peace of the same county "or counties, or two of them at the least, "whereof the clerk of the peace to be one; "and the same enrolment to be had and made "within six months next after the date of the "same writings indented."

The Act contains an exception of Lands, &c. lying within cities, boroughs or towns-corporate, where any officers have authority, or have lawfully used to enrol any evidences, deeds, &c.

(140.) It seems to have been always taken for granted that the Writing required by this Statute must be a Deed; that is, that it must be solemnly delivered, as well as sealed. And

Co.Litt. 229.a. this is, perhaps, implied in the requisition that the Writing be indented; the indented edge of the paper or parchment being the symbol of a duplicate in the custody of another contracting party*.

2 Sand. Us. 54. (141.) The Enrolment is a copy of the Deed upon parchment preserved among the records of the Court; and as this is required to be made within six months, without saying Calendar Months, the Law is understood to mean what are called Lunar Months, consisting each of twenty-eight days. (142.) There have been some conflicting Decisions upon the question in whom the estate is vested in the interval between the execution of the Deed and its 1 Prest. Conv 38. enrolment; but it seems now to be agreed, that an enrolment made at any time within the six months has the same effect as if it were immediate. (143.) The Deed may be enrolled, Taylor v. Jones, 1 Salk. 389. upon proof of its due execution, without the concurrence of the Bargainor.

Bac. Tr. 150. (144.) The efficacy of a Bargain and Sale appears never to have depended upon the Shep. Touch. 223. *amount* of the valuable Consideration; and it is

* (140. *n.*) Where, (as is most frequently the case,) there are mutual stipulations in a Deed, and it is intended that all parties should be equally bound by the Instrument, as far as its terms extend to them, the Deed is always indented; and it is most properly expressed in the beginning to be made between those parties, who afterwards declare their intention by verbs in the third person. Such a Deed is called an Indenture. Co. Litt. 47. b.; Litt. 371.

now unnecessary to prove an actual payment, if the Consideration be expressed in the Deed.

(145.) The only essential difference between a Covenant to stand seised to Uses, and a Bargain and Sale, setting aside the external formalities required to the validity of the latter, consists in the nature of the consideration; and (117.)
hence the same deed may operate for the benefit of different parties, both as one and the other; as, if " *A.* covenants that, in consideration that 1 Co. 154. b.
" *B.* is his son, he shall have the land for life, " and after his death, in consideration that *C.* " hath given him 100*l.*, that he shall have " it in fee." (146.) The enrolment gives such solemnity to a Bargain and Sale that it is said to be an Estoppel; but this is not to be under- 1 Leon. 184.
stood in the same sense in which an operation by Estoppel is attributed to a Fine or Feoff- (83.)
ment, so as to affect property afterwards ac- 1 Bac. Ab. 466.
quired (*a*), but merely that the validity of the Deed cannot be denied*.

(148.) Some time after the passing of the Statute of Enrolments, a loop-hole was discovered through which its object might be en-

* (147.) In another sense still, a Deed of Acquittance (or Release) is said to be an Estoppel, Co. Litt. 352. a.; which can only mean that the Deed, if valid, is a final bar to all existing claims, and all possibilities arising from previous contract, of which it imports a relinquishment; for it certainly cannot affect rights of which the foundation is (47.)
laid afterwards. Litt. s. 446.

[(*a*) But see above, (83) and the cases referred to in the note there.]

tirely evaded. For, as it seems to be confined in its terms, (though, it must be confessed, rather ambiguously,) to cases where an *Estate*
2 Co. 36. a. Barker v. Keat, 2 Mod. 249. *of Inheritance or Freehold*, or the Use *thereof* was to be made or take effect by reason *only* of a Bargain and Sale, it was concluded, that if a Bargain and Sale were first made for an estate less than Freehold, (as for one year,) and then
(44, 51, 52. 62.) the Inheritance or Freehold were superadded by a separate Deed of Release, the transaction could not be affected by the Statute; and that such Release to the Bargainee would be valid without his entry upon the lands, was a con-
(131.) sequence of the strong words in the Statute of Uses, which convert all vested Uses at once into estates. (149.) This is the origin of the Assurance by Lease and Release, in the form in which it is now commonly used for the Conveyance of Land; an Assurance which unites in itself many advantages. It is preferable to a Bargain and Sale, and to a covenant to stand seised to Uses, because it effects a transfer of the Legal Estate under the rules of the Common Law, and therefore the declaration of Uses
(124.) upon it needs not to be confined to persons from whom a consideration moves. It is also pre-
(148. 20.) ferable to a Bargain and Sale, and still more to a Feoffment, because no additional ceremony is necessary to its operation, but the transfer of property in land may be effected by it in any part of the world, as instantaneously as the payment of money. And where the subject of
(40.) Conveyance is Land in Reversion or Remainder,

it is also preferable to a mere Deed of Grant, as it makes it unnecessary for the Grantee, if his Title be called in question, to prove that there was a Particular Estate in existence at the time of the Grant.

(150.) It is not to be supposed that so extensive an alteration of the Law, as was effected by the Statute of Uses, could pass off without raising much doubt and litigation. Lord Bacon, writing late in the reign of Queen Elizabeth, calls it "a law whereupon the Inheritances of "this realm are tossed at this day like a ship "upon the sea, in such sort that it is hard to "say which bark will sink, and which will get to "the haven; that is to say, what Assurances "will stand good, and what will not." Tracts, 299.

(151.) It was early decided, that a Bargain and Sale to *B.*, to the use of *C.*, carried the Legal Estate to *B.*; for it was the nature of the Assurance to give the Use in the first instance to *B.*; and "a Use could not be engendered of "a Use;" meaning, as it seems, that any further expression, purporting to give the Use immediately, to another, was a mere contradiction, and therefore to be rejected. In the same manner, upon a Feoffment, &c., to *A.*, to the use of *B.*, in trust for *C.*, or to and to the use of *B.*, in trust for *C.*, the Legal Estate was held to be vested in *B.* (152.) It is most probable that if a similar case had arisen before the Statute, the Court of Chancery would also have adjudged the Use to *B.*; but now the intention

Tyrell's Case, Dyer, 155, a.

(116. 118.)

See Moore, 35. pl. 115. 1 Sand. Us. 28. Prest. Watk. Conv. 10, and conf. Butl. Fearne, C. R. 327. n.

Moore, 46. See Doe *v.* Passingham, 6 B. & C. 305.

was plain that *C.* should have the beneficial interest; that Court therefore determined that *B.* was a trustee for *C.*, and thus recovered its old jurisdiction; for the Courts of Law could not pursue the matter farther without contradicting their former decisions.

(153.) From these decisions has arisen a maxim, that *there cannot be a Use upon a Use;* but this is not to be understood as if the Use might not be made to shift from one person to
(122.) another, as well since the Statute as before. (154.) Doubts however have arisen on other grounds, as to the validity of a shifting Use in
1Sand.Us.155. a particular case, where it is contended that the Statute cannot apply. Thus, if Land be given by one of the old modes of conveyance to *A.* and his heirs, to the use of *A.* and his heirs, it is said that *A.* is *in* by the Common Law; he takes the Estate in the same manner as he would have done before Uses were invented. If then in the same conveyance there be a proviso, that on the marriage of *B.* the land shall go over to the use of him and his heirs, it is denied that *B.* can thence derive any legal
Co.Litt.237.a. advantage; for by the Common Law, such a proviso to shift the estate from one person to another would be void. (155.) On the other side, allowing, in their fullest extent, the propositions, that *A.* is in by the Common Law, and that by the Common Law such a Proviso would be void, it may yet be said, in the first place, that after the invention of Uses, and before the

Statute 27 H. 8, such an arrangement would have been effectual in Equity. It would have been unimportant whether *A.* and his heirs, or any other person, were allowed to enjoy the profits of the Land until the marriage; the trust for *B.* would clearly arise upon that event. Then it is to be considered, that the Statute gives every person such estate in the land as he has by other means in the Use; and that it is not necessary that the operation of the Statute should immediately follow the execution of the instrument by which the use is created; as appears clearly from the allowed effect of a Covenant to stand seised to uses upon the happening of a future event, where, in the mean time, the Covenantor's estate remains unaltered. And this view of the question is supported by many authorities.* 1 Sand. Us. 138. n.

* (155. *n.*) In Co. Litt. 248. a., a Case is mentioned, where a Feoffment in fee is made *to the use of the feoffee and his heirs,* until the Feoffor pay 100*l.* to him or his heirs; and it appears that if the Feoffor pay the 100*l.* the estate is divested, and returns to him without any further ceremony. The same case is in Dyer, 298. b., with this addition in stating the uses declared by the Deed of Feoffment, " that upon payment the feoffee and his heirs " should stand seised to the use of the feoffor and of his " heirs, and that then it should be lawful for the feoffor to " re-enter," &c. (Here indeed the last expression may be thought to indicate rather a Condition at Common Law than a Shifting Use; but in both books the case seems to be distinguished from that of a Condition. And whether there is any third description of Limitations to which it may by any possibility be referred is at least

(156.) The conclusion then, it is conceived, must be, that the objection cannot be sup-

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exceedingly doubtful; on which point see 1 Sand. Us. 199.) The Case of *Benicombe* v. *Parker*, (1 Leon. 25, or Fearne, C. R. 274.) is to the same effect. The case of *Boydell* v. *Walthall*, (Moore, 722,) arose upon a Feoffment made before the Statute, from *A*. to *B*. and *C*. in fee with an agreement, "that immediately after they, their heirs "and assigns, had occupied and taken the profits of the "land during the term of one hundred and one years, "without interruption by *A*. his heirs or assigns, or any "other in their name or title, then it should be lawful for "*A*. his heirs and assigns, into all the lands to re-enter, "&c. notwithstanding the Feoffment." And the feoffees and their assigns having enjoyed the land during the term, the question was whether the feoffor's heir might re-enter; and the two Chief Justices, Wray and Anderson, (to whom the Case was referred by the Court of Wards,) "upon "argument, agreed that the heir might enter. And they "delivered their reasons; *viz*. Because it appears that the "intent of the livery was that the Feoffor should have the "land again after the one hundred years quiet possession "of the feoffees; which intent is the Use of the Feoffment, "and that use arises out of the possession of the feoffees "immediately that the land has been enjoyed one hundred "years; (see Fearne, C. R. 367;) and for this, and by the "Statute of 27 H. 8, the heir of the Feoffor may enter;" and it was decreed accordingly. The case of *Smith* v. *Warren*, (Cro. El. 688.) was thus: *A*. being Tenant for life, conveyed his estate to and to the use of *B*. (the reversioner) and his heirs, upon condition that he should pay to *A*. during his life, 4*l*. per annum, and in default of payment that the land should be to the use of *A*. for his life. The Court appears to have considered the last limitation as a Springing Use; though "Glanville conceived, that being "limited to the Conusor himself, it was a Condition unto "him; but if it had been to a stranger to have arisen upon

ported; and therefore, with regard to the validity of a Springing Use, it seems unnecessary to ascertain whether a conveyance operates in the first instance entirely by the Common Law, or derives part of its effect from the Statute. But this question may occasionally be of importance for other purposes, and therefore it shall here be briefly considered. (157.) In the first place then it seems clear that (the Statute expressly requiring, as the condition of its (128.)
operation, that one person should be seised to the use of another) wherever the use is given in fee simple to the feoffee with a future or

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"such a condition, the non-performance thereof had been "a Springing Use unto him." For this he cited *Bracebridge's Case*, where a Feoffment was made to the use of the Feoffees and their heirs, on condition that they paid a large sum to the Feoffor within fifteen days, and in default of payment to the use of the Feoffor for life, with remainder to Thomas Bracebridge, his second son, in tail; and the money was not paid; this Case came before the Court more than once. In *Bracebridge* v. *Cook*, (Plowd. 420,) the title of Thomas Bracebridge seems to have been allowed, though it did not come directly in question; but in *Harwell* v. *Lucas*, (Moore, 99,) a decision was given in his favour. An equally satisfactory resolution upon the point is to be found in 1 Ventr. 194, where it is reported that "Hale "said, my Lord Co. made a Feoffment (provided that he "might dispose by his Will,) to the use of the Feoffee and "his heirs; and resolved in that Case he might declare "the Use by his Will, which should arise out of the "Feoffment;" and this is confirmed by the recent decision of two Judges in the similar Case of *Moreton* v. *Lees*, mentioned by Mr. Sugden in his Treatise on Powers, p. 133.

shifting use to some other person, there, as until the event upon which the use is to shift the feoffee is not seised to any use but his own, he is *in* by the Common Law. And this agrees with the rule laid down by Lord Bacon, "That

Tracts, 352. 4 M. S. 163.

"where the party seised to the use and the "*cestui que use* is one person, he never taketh "by the Statute, except there be a direct im-"possibility or impertinency for the use to take "effect by the Common Law." (158.) But I conceive that, notwithstanding some assertions of the same Author relative to particular cases, it may safely be laid down as a further general rule, that wherever any use, however partial, is given to another person, immediately or in remainder, and the manifest intention of the parties at the same time requires that all the uses declared should be made to take effect as estates by one and the same act, there the impossibility, or at least the impertinency mentioned by Lord Bacon, exists; and therefore all the parties are in alike by the Statute. (159.) There are two general cases in which this manifest intention of the parties appears.

(35.) Sammes's Case 13 Co. 54.

First, where the words of the Instrument are proper to create a Joint-tenancy; as, if *A.* be enfeoffed *to the use of himself and B.*, here, by a literal construction of the Statute, *B.* would take his share of the estate by Act of Parliament, leaving *A.* to take his immediately by the Feoffment; but then they would, contrary to the intention, be Tenants in Common instead

of Joint-tenants, because identity of Title is essential to Joint-tenancy; and therefore it has been decided that they are both in by the Statute. (160.) Secondly, wherever uses are (29.)
limited in* succession in the usual manner in

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* (160. n.) There is indeed a passage in Co. Litt. 22. b. which seems at first sight to exempt such cases from the rule. "If a man (says Lord Coke) make a feoffment in "fee, to the use of himself in tail, and after to the use "of the feoffee in fee, the feoffee hath no reversion, but "in nature of a remainder, albeit the feoffor have the "estate tail executed in him by the Statute, and the "feoffee is in by the Common Law, which is worthy of ob-"servation." This has been taken for an assertion that the feoffee, is *ultimately* in by the Common Law (see 5 Bac. Ab. 728;) but it may bear a very different meaning. The point to which Lord Coke directs the reader's observation is, that though the Feoffee is in the first instance in by the Common Law, (as he must be by force of the Livery made to him,) and the Statute afterwards comes and takes out of him a particular estate which it gives to the Feoffor, yet the Feoffee has not a reversion but a remainder. Now it is certain that if the same person who is here described as Feoffee, (and whom we may call *A.*) had been seised in fee, and had given an estate tail to *B.* by Bargain and Sale, though that estate tail would have received its legal essence from a similar operation of the Statute, yet *A.* would have had a reversion and not a remainder. It is therefore necessary to account for the difference; and this, it is submitted, cannot be better effected than by the interpretation, that though *A.* is in the first place *in* of the whole fee simple by the Common Law, he is immediately afterwards in of a remainder by the Statute. And this interpretation agrees with the language of the Case in Dyer, 362, b. cited by Lord Coke in the margin, where the objection suggested is not that the feoffee "is in by the Common Law," but that "the fee simple first passed to him."

which Remainders depending on Particular Estates are created at Common Law, (as if a Feoffment be made to *A.* and his heirs, to the use of *A.* for his life, and after his decease to the use of *B.*), the same reason seems applicable; for it is necessary to the existence of a Remainder, that it should be created at the same time and together with the Particular
Co. Litt. 143.a. Estate.

(161.) In connection with the subject just discussed, it may be worth while to notice a position of Lord Bacon's, which admits of much
Tracts, 352. doubt. "If," says he, "I bargain and sell my "land *after seven years,* the inheritance of the "Use only passeth, and there remains an estate "for years by a kind of subtraction of the "inheritance, &c. but merely at the Common "Law." This assertion seems to be pregnant with contradictions. If the Bargainor, during the seven years, is in by the Common Law (that is, by the same means as he was before the Deed was made), it is strange that the nature of his estate should be so entirely altered; that, the cause remaining the same, the effect should
(13. 18. 33.) be so different. Again, an Estate for years being only a chattel interest, the freehold, which cannot be in suspense or abeyance, must upon the supposition be immediately vested in the Bargainee; and yet, by the terms of the conveyance, its operation is suspended for seven years. Moreover, if the Bargainor die during the seven years, his Estate, being by the supposition a

chattel interest, will go to his executor; but if the case had happened before the Statute, it is plain that the old estate must have descended to his heir; and there was nothing in the transaction which could make the heir a trustee for the executor: so that, if Lord Bacon's doctrine be true, a legal estate is given through the operation of the Statute, to a person who before the Statute would have had no interest in the Use. It seems best, therefore, to consider the Bargainor in the same light as if he had deferred the operation of his deed until the happening of an uncertain event; that is, to consider him as seised of his old estate in fee until the springing use shall arise. And this appears to have been the construction adopted in the similar case of *Boydell* v. *Walthall* before mentioned, and has (155. *n.*)
several other authorities in its favour. 2 Salk. 675; Fearne, 390; Pollex. 30; and in Weale v. Lower, 54; 1 Ventr. 379.

(162.) The most perplexing question which has arisen on the Statute of Uses occurs in almost every case of a contingent or shifting use. If land be given to *A.* and his heirs, to the use of *B.* and his heirs, until the marriage of *C.*, and then to the use of *C.* and his heirs; here *B.* immediately becomes tenant in fee by force of the Statute; and to give him this estate the whole seisin of *A.* is exhausted; now the marriage takes effect, and who is seised to the use of *C.*? Not *A.*, for all the estate he had in the land was taken out of him; and not *B.*, for he took his estate by way of use, and therefore (151, &c.)
cannot stand seised to the use of another. But

the Statute cannot operate unless some person be seised to the use of *C.;* and if it do not operate, the intention of the parties is frustrated; and, as what would have been a good equitable estate before the Statute is not made a legal estate by the Statute, the intention of the Legislature is frustrated also. The dilemma may be avoided thus: By the conveyance *A.* is actually seised in fee to the use of *B.* in fee; but he has also a possibility of being seised to the use of *C.* The Statute takes all the present seisin of *A.* out of him, and gives it to *B.*, but it leaves the ulterior possibility where it was. Now the nature of this possibility was such before the Statute, that immediately upon the solemnization of the marriage, *A.*, having till then been seised to the use of *B.*, would, without any further act, become seised to the use of *C.* And accordingly, since the Statute, the seisin is suppose to return to *A.* upon the happening of the event, in order that from him it may be transferred to *C.* The capacity of *A.* to receive this future seisin is commonly spoken of as his * *Scintilla Juris;*

* (162. *n.*) Perhaps, if the matter depended on strict consistency of reasoning, it ought to be held that this *Scintilla Juris* is vested in *B.* instead of *A.* For *A.*'s possibility of seisin was the consequence of his actual seisin; and when this was taken away, and given to another, the accessary ought to attend the principal, or the effect to follow the cause. Nor is the objection to *B.*'s becoming seised to a use satisfactory; for although that estate into which his
(128.) own use was converted by the Statute could not be held by him to the use of another, yet there appears no reason

and though called in question by some writers, there are good authorities which testify to its existence, and (which is of more importance) to its destructibility. See Sugd. Pow. 11, &c.; 1 Sand. Us. 110. 175. 232.

(163.) As it is the nature of Springing or Shifting Uses to hang like a cloud over the inheritance, impairing its value by the uncertainty of enjoyment, the Courts have been careful to confine them within reasonable limits of time, of which more shall be said hereafter. Chap. 4. [(784, &c.)] But it may be stated generally that, for the most part, the extreme period within which such a Use must take effect in possesion, is the life of some person in being at the time of the conveyance, and twenty-one years more.

(164.) It remains here to say something of the manner in which Uses are declared.

As the Use now carries with it the legal estate, the word "heirs" is necessary to con- 1 Sand. Us. 122.

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why the estate of *A.*, which was transferred to him (*B.*) by the same Statute might not be so held; and it cannot be said, in reasoning upon the supposed *Scintilla Juris*, that these two estates are the same, when the one exceeds the other by the *Scintilla* itself. This indeed seems to have been adverted to by the Legislature; for, as Lord Bacon observes, (Tr. 339,) "Whereas before, when the Statute "speaks of the Uses, it spake only of Uses in possession, "remainder and reverter, but not in title or right; now, "when the Statute speaks what shall be taken from the "Feoffee, it speaks of title and right; so that the Statute "takes more from the Feoffee than it executes presently, "in case where there are Uses in contingence, which are "but titles." (132.)

stitute a fee simple; and in general the same words must be used to ascertain the quantity (*i. e.* the extent and duration) of the estate, as at Common Law. (165.) But in modifying the rights of Companions in estate, this strictness is a little relaxed. The Common Law preferred a Joint-tenancy to a Tenancy in Common, because the former afforded room for the reunion of the property by survivorship, in a single individual; who might more effectually perform the duties incident to the Feudal Tenure of the land, than several persons among whom the same burden was divided. On the other hand, the system of Equity, attending rather to general convenience than to the privileges of the lord, has always been more favourable to a Tenancy in Common, as ascertaining from the first the rights of the parties, and of all who may have claims upon them. Hence, in a conveyance to the use of two or more persons, upon which the Statute may operate,
Rigden *v.* Vallier, 2 Ves. 252. 1 Sand. Us. 124. the words, "equally to be divided," will constitute a Tenancy in Common (*a*); though, if they were in by the Common Law, some more pre-
(37, *n.*) cise expression would be requisite to counteract the general presumption in favour of Joint-tenancy. (166.) By the first three sections of

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[(*a*) And in a *will*, the words, "in equal shares," "share "and share alike," "in joint and equal shares," "jointly "and between," "unto and amongst," have been held to constitute a tenancy in common.]

the Statute of Frauds, 29 Car. 2, c. 3, it is enacted—

1st, "That all Leases, Estates, Interests of "Freehold, or Terms of Years, or any uncer-"tain Interest of, in, to or out of any Mes-"suages, Manors, Lands, Tenements, or Here-"ditaments, made or created by livery and "seisin only, or by parol, and not put in writ-"ing, and signed by the parties so making or "creating the same, or their agents thereunto "lawfully authorized by writing, shall have the "force and effect of leases or estates at will "only, and shall not, either in law or equity "be deemed or taken to have any other or "greater force or effect, any consideration for "making any such parol leases or estates, or "any former law or usage to the contrary not-"withstanding."

2d, "Except nevertheless all leases not ex-"ceeding the term of three years from the mak-"ing thereof, whereupon the Rent reserved to "the Landlord, during such term, shall amount "unto two third parts at the least of the full "improved value of the thing demised."

(167.) 3d, "And moreover, that no Leases, "Estates or Interests, either of Freehold, or "Terms of Years, or any uncertain Interest, not "being Copyhold or Customary Interest, of, in, "to or out of any Messuages, Manors, Lands, Te-"nements or Hereditaments, shall be assigned, "granted or surrendered, unless it be by Deed "or Note in Writing, signed by the party so as-

"signing, granting or surrendering the same, "or their Agents thereunto lawfully authorized "by writing, or by act and operation of law."

1 Sand. Us. 99. &c.

(168.) By force of this Statute, the Use, which carries with it the Legal Estate, must be declared in writing, except that, as between the Grantor and Grantee in any assurance which takes effect by the Common Law, whether the Use shall result to the former or vest in the latter, seems to depend on the same circumcumstances as formerly.

(126.)

Ld. Anglesey v. Ld. Altham, 2 Salk 676.

(169.) Where the Conveyance is by Deed, it is the universal practice in the same Deed to insert the declaration of Uses, or else to refer circumstantially to another Instrument in which it is contained, which comes to the same thing. But no such modern additions can be admitted into the Records of the Court of Common Pleas; and therefore the Uses of a Fine or Recovery must be declared by a separate Instrument. (170.) This may be done either before or* after the moment when the Fine or Recovery takes effect, and it should seem at any time during the lives of the parties; and though, where it is thus subsequent to the assurance to which it relates, it must be considered as the

Dowman's case 9 Co. 7. b.; 2 Prest. Conv. 26. 42.; 1 Sand. Us. 210, &c.

* (170. n.) It having been doubted whether, since the Statute of Frauds, a Declaration made subsequently to the Fine or Recovery could be valid, the St. 4 Ann. c. 16, was made, in s. 15, to remove that doubt. See 1 Sand. Us. 212.

manifestation of a previous intention, and as operating virtually from the same time as that Assurance; yet on the common principle of (153.)
Springing Uses, it may well be made to give a vested Estate from its own date only; and being once made it cannot afterwards be set aside or controlled by a new declaration or agreement, for the transaction is then complete in all its parts. (171.) But where the Declaration of Uses precedes the Fine or Recovery to which it refers, it may be annulled or varied in the interval by another instrument, executed with equal solemnity by all the parties concerned in interest.

(172.) By the united operation of a common Law Assurance and a Declaration of Uses, the property is as permanently fixed and settled as it could have been anciently by the Common Law Assurance only, unless some of the Uses declared be of the Springing or Shifting kind. But Uses of that kind may be created in either of two ways: the event on which the Use is to arise, the extent and limits of that use, and the person in whom it is to vest, may be particularized in the original Declaration itself; or some or all of these particulars may be expressly left to the future discretion of an individual. In the last case a Power of Revocation and new Appointment is said to be reserved or given.

(173.) These Powers confer the right of alienation as distinguished from that of enjoyment; and both the extent of this right, and Sug. Pow. 207. 210.

the mode of exercising it, (whether by simple writing, deed or other solemnity,) are regulated absolutely by the terms of the instrument by which the power is created,

(174.) But the continuance of the Power unexercised is restrained by general rules of
(163.) Law. These, so far as they relate to the bounds which must be prescribed to the power in its original creation, shall be discussed hereafter; while in this place we confine ourselves to the consideration of subsequent acts which the law deems inconsistent with its continuance.

10 V. J. 267; Doe v. Martin, 4 T. R. 39. (175.) And first, to put the simplest case: if lands be conveyed to such uses as *A.* shall by any writing, signed with his hand appoint, and, in default of such appointment, to the use of him and his heirs; (by which he becomes seised of the fee simple, subject to be divested by his own appointment;) here if *A.*, without exercising his Power of Appointment, convey the Lands to another person in fee simple, the
Sugd. Pow. 52. Power is extinct. (176.) And in like manner, if he had (*a*) conveyed a partial interest, as for

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[(*a*) But where instead of *A.*'s conveying any actual estate or interest, judgment of debt merely had been entered up against him, by which a moiety of his lands became liable to be *extended*, (see * 875,) a subsequent execution of his power of appointment was held to be valid, and to defeat the lien of the judgment creditor; the judgment being considered, not as the act of *A.*, but as a proceeding *in invitum*. *Doe* v. *Jones*, 10 B. & C. 459. The law, however, respecting judgments for debt, and their effect on the lands

years, for life, or in tail, he could not afterwards have defeated it by his Power; which, however, he might still exercise over the Reversion.

(177.) It is likewise clear, that wherever a person has a partial interest in the land, and also a power which, though extending beyond, yet in its exercise must necessarily affect, that interest,* by conveying away his whole interest he destroys his power (*a*). (178.) But it seems to be a received opinion, that if upon this Con- Sugd. Pow. 58. 59; 1 Sand. Us. 431.

* (177 *n.*) It is difficult to reconcile the decision in *Long* v. *Rankin*, (Sugd. Pow. App. fourth edition,) with the rule here laid down: but that Case seems to have depended so much more on the peculiar interpretation given to the words creating the Power than upon any general principle of law, that it cannot, it is conceived, be considered as establishing an exception. Lord Mansfield's decision in *Renn* v. *Balkeley*, (Dougl. 279,) that a conveyance by which a merely equitable interest is reserved does not destroy the Power, has been much disapproved of. See Sugd. Pow. 56.

of the debtor, has been materially altered by recent enactment; (see 875;) and it is conceived that the like case would now be decided the contrary way.]

[(*a*) And the same effect will be produced by his bankruptcy, which may be considered as a conveyance, *by operation of law*, to the assignees. (242 n. (*)).) See 1 Sugd. Pow. 79—82, 6 ed.; see also *Hole* v. *Escott*, 2 Keen, 444, 465; and S. C. on appeal, 4 My. & Cr. 187, 191, 192. But the Bankrupt Acts provide that all powers which the bankrupt might execute *for his own benefit*, may be executed by the Assignees for the benefit of the Creditors. (246.)]

veyance* (not being by Feoffment, Fine or Recovery) the use result or be declared to the Grantor, though without any mention of the Power, and there be nothing else in the transaction inconsistent with the existence of the Power, it will continue as a privilege annexed to the old estate.

(179.) In the cases just mentioned the Power is said to be Appendant to the estate of the party to whom it is given. And this denomination is also commonly applied to such a Power as in its exercise may possibly, though it will not necessarily affect that estate. But it seems clear that such a power may be apportioned, so that as to the estate which is aliened, it will, like other Powers Appendant, be extinguished; but as to any other estate in the same Tenement over which the Power may extend, it will come under the same consideration with the Powers in Gross next mentioned.

1 Sand. Us. 435; Sugd. Pow. App. 663.

(180.) If the same person have an interest and also a Power which in its exercise cannot interfere with that interest, this is called a Power in Gross; and such a person's Conveyance†, unless it be by Feoffment, Fine or Re-

Edwards v. Slater, Hardr. 410.

* See next note.

† (180. n.) It has sometimes been contended that the destruction of Powers by a Feoffment, Fine, or Recovery, is a necessary consequence of the violent or conclusive operation of those Assurances. "Fines and Feoffments," says Lord Hale, (1 Ventr. 228,) "do ransack the whole "estate, and pass or extinguish, &c. all rights, conditions,

covery, or sufficiently express an intention so to do, will not destroy his power.

*(181.) Another kind of Power in Gross is that which a person who conveys away all his estate at the same time expressly reserves to himself over the Use; and this he may extin- Sugd. Pow. 47.

" powers, &c. belonging to the land, as well as the land "itself." However, it appears from the expressions of the same Judge, as well as from the decision of the Court, in *Edwards* v. *Slater*, (Hardr. 417,) that the disturbance or divestment of Estates by Feoffment, &c. if it be not the act of the owner of the Power, does not destroy it: and therefore it is not the mere *violence* of the Assurance which has that effect. And as to its *conclusiveness*, it may be observed that the operation of every instrument must (on rational principles) be grounded on a supposition of the party's intention; and though the form of the instrument is in general sufficient evidence of that intention, yet if a purpose be expressed which falls short of that which might otherwise be presumed, the enforcement of the presumptive in preference to the declared intent is at least a strong measure, and such as requires to be sanctioned by a positive law. But the existence of such a law in this matter has never been shown; while there is a general rule concerning Estoppels, of an opposite import; *viz.* that when the truth appears on the face of the instrument, no conclusion shall be made against it; (Co. Litt. 352 b.) and here the Deed, and the Fine or Recovery, are to many purposes one instrument. The point appears (84. 85.) to have received a final decision in the case of *E. of Jersey* v. *Deane*, (5 B. & A. 569,) where the effect of a Fine to destroy Powers was controlled by the accompanying deed. See also *Tyrrell* v. *Marsh*, 3 Bing. 31. A Fine, when attended with a proper Declaration of Uses, has also been held to operate as an Appointment in pursuance of the Power. See Sugd. Pow. 68.

guish by Release, or Fine, or any act equally conclusive. (182.) And a Power given to a Stranger, to be exercised for his own benefit, seems to be of the same nature.

(183.) Lastly, if by any Conveyance, a Power be given to a person who neither granted nor took any interest in the Tenement by that Conveyance, and this power be not exercisable by him for his own benefit, he cannot by any act whatever extinguish or release it. This is called a Power simply collateral; which means that it is extrinsic, and totally unconnected with any interest in the land. (184.) A Power of altering the distribution of property amongst the persons already entitled, has by some authors been considered as of this nature. But though no direct or palpable benefit ought to accrue to the party from his exercising such a Power, (for that would be contrary to the design of its creation, which was to enable him, as an impartial Judge, to reward or punish, and would therefore in Equity vitiate the Appointment,) yet the authority and influence which must attend upon such a discretion may be thought to constitute an interest capable of being released; and so it has in one instance been decided.

Smith v. Death; Sug. Pow. 81.

(185.) Sometimes a Power of Revocation is given, without any express power of appointing new Uses; but it seems that if this be done upon the original conveyance, the latter Power is implied. On the other hand if a

Sugd. Pow. 316. 321.

mere power of Revocation be inserted in an Instrument of Appointment, the exercise of it can only restore the Uses of the original Settlement.

(186.) A Springing Use may, as well as the immediate Use, be divided into Particular Estate and Remainder; but then the Remainder is itself a mere Springing Use until the time be come for the Particular Estate to vest in possession; and if the Particular Estate have failed, the ulterior Estate will take effect in possession, according to the terms of its creation, as constituting the entire Springing Use; but if the former have once become vested, the latter must then stand or fall as a Remainder. Fearne, C. R. 505; 1 Sand. Us. 141; Doe v. Fonnereau, Dougl. 470. 490.

(187.) It has been much doubted whether a Springing Use, previously to its vesting in possession or remainder, can be so far affected by a Fine, levied by the owner of the fee for the time being, as to be absolutely barred unless reduced into possession within five years after the right of possession shall accrue (*a*). The better authorities seem to extend the operation of the Statute of Fines to such a case. The right certainly originates in " cause or matter had and Plowd. 373. a.; 1 Tau. 607, &c.; 6 Tau. 270. (89.)

[(*a*) A Fine can not now be levied; nor could the effect suggested in the text be produced by any Assurance which the late Act substitutes for a Fine. But if the person entitled to such Use suffers 20 years to elapse after the right of possession has accrued, he will, it seems, be barred, if under no disability at the time of such accruer. See below, 370, n., & p. 150, n.*] [66, n.]

(99.) "made before the Fine levied." And the Argument, that the estate is not barred because it was never divested, loses much of its force, when it is considered that the Springing Use was from the beginning little else than a right, or that which a divested estate becomes.

SECT. 3.—*Of Legal Incapacity; and of some other Statutes relating to Alienation.*

(188.) The Alienation of Real Property may be prevented or frustrated by the incapacity of the Grantor to give, or of the Grantee to receive it; or by the refusal of the latter; or by a prohibitory or remedial Statute: and the power of alienation is sometimes also conferred or enlarged by Statute. Some information, on all these heads, is intended to be given in the present section.

Co. Lit. 2 b. (189.) Persons who have committed Treason or Murder, if sentence of death ensues, (by which they are said to be *attainted*,) lose all power over their property from the time of the criminal act (*a*); which, if it be High Treason, gives a right to the King by Forfeiture; (190.)

[(*a*) But until Office found for the King, or entry made by the lord, the land remains in the offender; and his alienation is good against all persons except the King or the lord who may defeat it. See *Doe* v. *Pritchard*, 5 B. & Ad. 765. He is also, it seems, entitled to the mesne profits of the land before attainder, for his support.]

if Petit Treason or other Murder, to the Lord by Escheat. (191.) Other Felonies, since the [329.] Statute 54 Geo 3, c. 145, seem to leave to the Offenders the power of disposing of their estates to be enjoyed after their deaths.

(192.) If Lands or Tenements be purchased by an Alien, the Crown also acquires a right to them(*a*); which no act of the Alien can defeat. (193.) And every person born out of the King's Dominions is originally an Alien, unless his Father be, at the * time of the birth, a natural born subject, and neither attainted of Treason, nor liable to its penalties if he should return home, nor in the actual service of any hostile

Co. Litt. 2. b. 42. b.; and see Litt. 178.

[330.]

Doe *v.* Jones, 4 T. R. 300.

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* (193. *n.*) Persons born in the United States of America, since their separation from this country, whose Fathers, by that separation ceased to be subjects of the King, are Aliens. *Doe* v. *Acklam*, 2 B. & C. 779; *Doe* v. *Mulcaster*, 5 B. & C. 771(*b*).

[(*a*) How far the same rule holds as to trust estates or equitable interests in lands or tenements, seems not to be clearly ascertained. But it seems that where lands are given to a subject on trust to sell and to pay the purchase money to an alien, the Crown cannot interfere. See and compare, *Fourdrin* v. *Gowdey*, 3 My. & K. 383, *Du Hourmelin* v. *Sheldon*, 1 Beav. 79.]

[(*b*) Americans seised of lands in England on the 28th of October, 1795, and their heirs and assigns, are enabled to convey and devise them as if they were natives. See St. 27 Geo. 3, c. 97, s. 24; and *Sutton* v. *Sutton*, 1 Russ. & My. 663.]

Prince or State (St. 4 G. 2, c. 21;) or be himself the son, having the three last qualifications of such a Father, (St. 13 G. 3, c. 21.) (194.)

Co. Litt. 8 a.; 7 Co. 25. b. But an Alien may be naturalized by Act of Parliament, or made a Denizen by the King's Letters Patent; in either of which cases he becomes capable of holding and disposing of Real Property. [Fourdrin v. Gowdey, 3 My. & K 383.]

(111.) Cru. Fi. 127; Cru. Rec. 185. (195.) All acts of Idiots and Lunatics are void, except that if by any accident one of them should be allowed to levy a Fine, or (in person, and not by Attorney,) to suffer a Recovery, no evidence of his disability can afterwards be admitted, as that would contradict the Record. (196.) And a Feoffment made by a Lunatic in person must also be excepted, as being not absolutely void, nor even voidable by himself, though his heir may avoid it. (197.) The fact of Lunacy, including the time of its commencement, is often ascertained by means of a Commission from the Lord Chancellor for that purpose, in the lifetime of the Lunatic (*a*). [Sug. Pow. 402.]

(198.) An Infant cannot make any conclusive alienation, unless by Fine or Recovery; which, if once admitted, (except in the case of a Recovery suffered by Attorney,) cannot be reversed, with- [See now (66 n. (*a*).)] Cru. Fi. 121; Cru. Rec. 182.

[(*a*) For the mode of issuing and proceeding upon such commission, see 2 Madd. Ch. Pr. 723, &c. A late act, St. 3 & 4 Wm. 4, c. 36, was passed for diminishing the inconvenience and expense of such commissions.]

out a personal examination of the party by the Court during the continuance of his minority. (199.) The Feoffment * of an Infant is voidable, not void; so of a Lease by which rent is reserved, and perhaps any convenience which at the time is beneficial to the Infant, (if indeed it be even voidable,) or which, if adult, he might be compelled to make; (200.) and he may make an effectual presentation to an Ecclesiastical Benefice. (201.) But he cannot in any case, authorize another person, by the Deed of delegation which is called a Letter of Attorney, to act in his name; such a Deed would be absolutely void.

Zouch v. Parsons, 3 Burr. 1794; [see Co. L. 51. b. & n. 3. Ib. Harg.]

Maddon v. White, 2 T. R. 159.

Co. Litt. 89 a.; and Harg. n. ib.

3 Burr. 1804.

(202.) The Guardians of Infants have no power by law to dispose of their Real Property unless it be to make Leases, which may continue in force during their minority (*a*). (203.) But the *Committees* of Lunatics, (*i. e.* the persons to whose care they and their estates may have

4 Bac. Ab. 138: Roe v. Hodgson 2 Wils. 129. 135.

* (199. *n.*) By the custom of Gavelkind, an Infant at the age of 15 may make a valid Feoffment of Lands which he has by descent; but it must be by way of Sale. 3 Bac. Ab. 361.

[(*a*) By St. 1 W. 4, c. 65, an infant, or his guardian in his name, is enabled, under the direction of the Court of Chancery or Exchequer, to renew leases; (s. 12;) and also, where the infant, if of age, would be compellable to do so, to grant renewals of leases; (s. 16;) and also, where it shall appear to the Court to be for the infant's benefit, to grant original leases of his land for such terms and at such rents as the Court shall direct. (s. 17.)]

(197.) been committed by the Lord Chancellor,) are empowered by St. 43 Geo. 3, c. 75, (extended to Customary Property by St. 59 G. 3, c. 80, s. 2,) to grant leases on behalf of the Lunatic, and to raise money for the payment of his debts or performance of his engagements, by sale or mortgage, as the Chancellor may direct (*a*).

See Sugd. Vend. 185. n.

(204.) It sometimes happens that Real Property may be vested in an Idiot, Lunatic, or Infant, in trust for some other person, or as a pledge for the repayment of money; he may in short be a Trustee or Mortgagee; in which cases the person entitled to the beneficial interest, or to the Redemption, may be prejudiced by his disability to convey. And therefore by several Statutes, and ultimately by St. 6 G. 4, c. 74 (*b*), (which has repealed all the rest,) it is

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[(*a*) These Acts are now repealed, but their principal provisions re-enacted, by St. 1 W. 4, c. 65; which further enables the Committee, under the direction of the Lord Chancellor, in cases where the lunatic had, previously to his becoming insane, contracted to sell his land, to convey the land according to the contract. (s. 27.)]

[(*b*) This Act is now repealed, so far as regards the provisions here mentioned, by St. 1 W. 4, c. 60, which, however, re-enacts them, and extends them to certain cases of Trustees not comprehended in the former Statute; in particular to the case of the infant heir of a person who had before his death contracted to sell the estate; (s. 16;) and of the devisees in strict settlement of such person; (s. 17;) and, generally, to cases of constructive or resulting trusts. (s. 18.) But in these cases, the Act requires that the right

provided that, on Petition to the Court of Chancery or Exchequer, or (for lands within their particular jurisdictions,) the Court of the Duchy Chamber of Lancaster, the Court of Exchequer of the County Palatine of Chester, the Courts of Chancery of the Counties Palatine of Lancaster and Durham, and the Courts of Great Session in Wales, Infant Trustees and Mortgagees may be enabled, by order of the Court, to make valid* conveyances; and upon the like application to the Lord Chancellor (*b*), (or Lord Keeper or Commissioners of the Great Seal,) the *Committees* of an Idiot or Lunatic, or some other person to be appointed for the purpose, may convey in the Idiot's or Lunatic's name. (205.) And, to avoid the repetition of this Statute, it may here be added, that when any Trustee or Mortgagee is living out of the

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* (204. *n.*) These may be by Fine or Recovery, if rendered necessary by the circumstances independently of Infancy. Cru. Fi. 125; Id. Rec. 185 (*a*).

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of the party to a conveyance from such Trustee shall be previously declared by a decree of the Court.]

[(*a*) And so, under the Act 1 W. 4, c. 47, (below, 205, n. (*b*),) an infant tenant in tail may be compelled to convey by the mode of assurance now substituted for a fine or recovery. *Radcliffe* v. *Eccles*, 1 Keen, 130.] [682. 698.]

[(*b*) Of Great Britain or of Ireland, as the case may require. (1 W. 4, c. 60, ss. 26, 27.) The act does not extend to Scotland.]

jurisdiction of the Courts of Chancery and Exchequer, or it is unknown whether he be living or dead, or if he refuse to make a proper conveyance, those Courts are empowered by s. 5, upon Petition, to appoint a person to convey in his name(*a*). And by s. 4, the like appoint-

[(*a*) Sect. 8 of St. 1 W. 4, c. 60, provides, that where a Trustee is out of the jurisdiction, or it is uncertain, where there were several Trustees, which was the survivor, or whether the Trustee is alive or dead, or, if known to be dead, it is not known who is his heir, or if the Trustee or his heir refuses to convey, the Court may appoint a person to convey for him.

St. 4 & 5 W. 4, c. 23, enacts, that where a Trustee or Mortgagee dies without an heir or devisee, the Court of Chancery may appoint a person to convey, in like manner as if such Trustee or Mortgagee had left an heir, and it was not known who was such heir. (s. 2.)

And it further enacts, that no land or chattels vested in any person upon any trust, or by way of mortgage, shall escheat or be forfeited by reason of the Attainder or Conviction of such Trustee or Mortgagee, but shall remain and go as if no such Attainder or Conviction had taken place. (s. 3.)*

And by St. 1 & 2 Vict. c. 69, where the devisee or heir or other real representative of a deceased Mortgagee, (such Mortgagee not having been in possession of the land, and

[* And it provides, (s. 6,) that where before the passing of the act any Trustee shall have died without an heir, or shall have been convicted, the land and chattels escheated or forfeited, or become subject to escheat or forfeiture thereby, shall be subject to the disposition of the Court of Chancery, in such manner as is provided by St. 1 W. 4, c. 60, in case such Trustee were out of the jurisdiction; saving, however, the interests of persons then entitled under such escheat or forfeiture by grant or twenty years' possession.]

ment may be made by the Chancellor, &c., on behalf of an Idiot or Lunatic who has not been found such by Inquisition (*b*). [1 W. 4, c. 60, s. 5.]

(206.) We have already seen that a married woman may with her husband make an effectual (66.)

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the mortgage money being paid to his executors or administrators,) is out of the jurisdiction, or it is uncertain, where there were several joint devisees, who was the survivor, or whether such representative is alive or dead, or, if known to be dead, it is not known who was his heir, or where such Mortgagee or any such representative is dead without an heir, or if any such representative refuses to convey; the Court of Chancery is empowered to appoint a person to convey in like manner as is provided by the St. 1 W. 4, c. 60, in the cases therein mentioned. (s. 1.)

And it is enacted, (s. 3,) that neither of the before-mentioned acts of 1 W. 4, c. 60, and 4 & 5 W. 4, c. 23, shall extend to any case of a person dying seised by way of mortgage, other than such as are in that act (1 & 2 Vict. c. 69,) expressly provided for. On the construction of these acts, as regards mortgagees, see *Green* v. *Holden*, 1 Beavan, 217.]

[(*b*) By St. 1 W. 4, c. 47, any Court of Equity is empowered to direct and compel a conveyance by an infant heir or devisee, or a devisee having a partial interest, of a person whose estates shall have been decreed by the Court to be sold for payment of his debts. (ss. 11, 12.) And by 2 & 3 Vict. c. 60, the Court is empowered to make mortgages as well as sales, of such estates; and to make such sales or mortgages, in the case where the devisee of a partial interest is an *infant*. But sales by such devisee, being an infant, seemed to have been already fully provided for by St. 1 W. 4, c. 47, as also by the similar enactments of 1 W. 4, c. 60. See note of Sir E. Sugden, (who was the framer of both the acts of 1 W. 4,) 2 Vend. and Pur. p. 195.]

[See 66 n. (b).] Assurance by Fine or Recovery, and in order
1 Sand. Us 215. to this, she may join with him in the Declaration of Uses; but all her other Deeds and Contracts, by which she might be deprived of any right, or charged with any duty, are void
Sugd. Pow. 155 by the Common Law(*a*). (207.) Yet she is capable of exercising a power of Revocation or Appointment of uses, a privilege which seems to have been unwarily bestowed upon her, through
Co. Litt. 52 a. 187 b. a supposed analogy to the power which the Common Law allowed her of acting as the mere instrument or attorney of another person.
[237.] And by Stat. 32 H. 8, c. 28, as we shall presently see, her concurrence is required to the Leases which her husband is by that Statute empowered to make.

(130.) (208.) Before the Reformation, though Mo-
Co. Litt. 347. a. nastic Corporations were allowed to hold Real Property, every Monk by himself was incapable, being *mortuus sæculo*, or civilly dead. But there seems now to be no person absolutely disqualified by our Law from purchasing any property which is not of an official nature.
See Butl. Co. Litt. 391. a. n. 2. (209.) Papists, indeed, by Stat. 11 and 12 W. 3, c. 4, are disabled; but by Stat. 18 G. 3, c. 60, Stat. 31 G. 3, c. 32, and Stat. 43 G. 3, c. 30, they are enabled to qualify themselves by taking

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[202 n. (*a*).] [(*a*) The provisions of St. 1 W. 4. c. 65, ss. 12 & 16, for renewing leases and granting renewals of leases, extend also to married women.]

a special Oath of Allegiance(*a*). (210.) It is said that the Parishioners, or Inhabitants, or Churchwardens, of any place are not capable to purchase lands; but this is to be referred to the want of a sufficient description of their persons, and to the apparent intention that they should take in a corporate capacity, with which they are not invested. And now by Stat. 9 G. 1, c. 7, s. 4, the Churchwardens with the Overseers are enabled to purchase a Workhouse for the Poor; and further powers are given by Stat. 22 G. 3, c. 83, and 59 G. 3, c. 12(*b*). (211.) A Wife, by

Co. Litt. 3. a

Woodcock *v.* Gibson, 4 B. & C. 462.

Co. Litt. 112. a.

[(*a*) By St. 2 & 3 W. 4, c, 115, Papists are put on the same footing with Protestant Dissenters, in respect to their Schools and Places for Worship, Education, and Charitable Purposes. And the act is retrospective; see *Bradshaw* v. *Tasker*, 2 My. & K. 223, & id. 695.]

[(*b*) The powers given by these acts are, by St. 4 & 5 W. 4, c. 76, s. 21, directed to be exercised under the control of the Poor Law Commissioners. And by St. 5 & 6 W. 4, c. 69, the Guardians or Overseers of any Union or Parish are empowered, with the approbation of the Poor Law Commissioners, to purchase of any person, (whether under any legal incapacity or not,) any land or buildings for a workhouse, or for any other purpose relating to the relief of the poor; and also to sell and dispose of any workhouses, land, or property belonging to the Union or Parish. And for these purposes the Guardians of every Union and their successors in office, are incorporated by the name of "The Guardians of the Poor of &c." and are empowered to take and hold lands, or other property, and to use a common seal. By St. 1 Vict. c. 50, the provisions of these two acts of W. 4, are extended to copyhold lands.

And by St. 6 & 7 W. 4, c. 70, Sites for Poor Schools,

the Common Law, cannot purchase from her husband: but this is only because they do not constitute two contracting parties, and under the Statute of Uses, by the intervention of a third person, the objection is removed.

2 Ventr. 206.

(212.) But no person can be made to take an estate without his consent, express or implied; and therefore the purchases of Idiots, Lunatics, Infants, and Femes Covert, if disadvantageous, may be set aside. (213.) And it is common for Trustees, when nominated without their consent, to renounce the estate conveyed to them, which is done by Deed of Disclaimer.

Co. Litt. 2. b. 3. a.

Nicloson *v.* Wordsworth, 2 Swanst. 365.

[Begbie *v.* Crook, 2 Bing. N. C. 70; Urch *v.* Walker, 3 My. & Cr. 702.]

(214.) Some prohibitory Statutes, not amounting to a total disqualification, have been framed upon general principles of State policy. Thus, by several old Statutes, Alienations of Lands and Tenements in Mortmain (*i. e.* to religious and other Corporations, which were supposed to hold them in a deed or unserviceable hand,) were prohibited under pain of forfeiture to the

Co. Litt. 2. b. 98, b. 99. a.

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and for Houses for the Masters and Mistresses, may be conveyed, notwithstanding any legal incapacity of the Grantor, to the Minister and Churchwardens of the Parish, or to the Trustees of the School; or, if the Site be Church Land, (in which case the School is to be for Education according to the Church of England,) to the incorporated National Society for the Education of the Poor, or to the Minister and Churchwardens, or to Trustees to be named by the Bishop of the Diocese.

The conveyance is to be by Bargain and Sale enrolled, and the land conveyed is not to exceed half an acre.]

Lord, the fruits of whose feudal Seignory (the great hinge of Government in those days,) were thus impaired. But by the concurrent consent of the immediate and all other subordinate Lords with that of the Lord Paramount, (*i. e.* the King,) this forfeiture might be dispensed with. And now the Stat. 7 and 8 W. 3, c. 37, has made a licence from the Crown a sufficient dispensation in all such cases. (215.) At a later period, however, it was thought fit to place some further restraint upon donations of real property for charitable purposes: and by Stat. 9 G. 2, c. 36, it was enacted, that all conveyances (*a*), &c. for any charitable uses, (although not to corporations,) should be void un- "less made by deed indented, sealed and delivered in the presence of two or more credible "witnesses twelve calendar months at least before the death of the donor or grantor, (including the days of the execution and death,) "and be enrolled in his Majesty's High Court of "Chancery, within six calendar months next "after the execution thereof; and unless the "same be made to take effect in possession for "the charitable use intended immediately from

See 1 Bac. Ab. 593; 2 Fonbl. 213; Jac. 183. Doe *v.* Hawthorn, 2 B. & A. 96; Doe *v.* Wrighte, 2 B. & A. 710.

See 3 M. & S. 410.

[(*a*) The Act extends to any charge or incumbrance affecting land, or any money, &c. to be laid out in the purchase of land or of any estate or interest therein, or of any charge or incumbrance affecting the same. (s. 3.) See *Harrison* v. *Harrison*, 1 Russ. & My. 71; *Collinson* v. *Pater*, 2 Russ. & My. 344; *Giblett* v. *Hobson*, 5 Sim. 651; S. C. on appeal, 3 My. & K. 517.]

"the making thereof, and be without any power "of revocation, reservation, trust, condition, "limitation, clause or agreement whatsoever, "for the benefit of the donor or grantor, or of "any person or persons claiming under him." But it is provided that what relates to the sealing and delivering of the Deed, *Twelve Calendar Months before the Death of the Grantor*, shall not extend to any purchase "to be made "really and *bona fide* for a full and valuable "consideration, actually paid at or before the "making of such conveyance without fraud or "collusion(*a*)." And the two Universities and their Colleges, and (in favour of their Scholars only) the Colleges of Eton, Winchester and Westminster, are exempted from the operation of the Statute, with one restriction only, which has since been taken off by Stat. 45 G. 3, c. 101. The like favour has been extended to the British Museum, by Stat. 5 G. 4, c. 39, s. 3.

[Doe *v.* Hawthorn, 2 B. & Ald. 96; Doe *v.* Howells, 2 B.&Ad.744.]

[210, *n.* (*b.*)]

(216.) By Stat. 1 Ann. c. 7, the Crown Lands and Hereditaments (except Advowsons) in England and Wales are made inalienable, except that they may be leased for thirty years, or three lives, under the restrictions there imposed. Property forfeited to the Crown for

[(*a*) This provision was only intended to prevent such purchases from being avoided by the death of the grantor within the twelve months, and not, as it was generally apprehended, to exempt such purchases altogether from the operation of the act. The St. 9 Geo. 4, c. 85, was therefore passed to correct this mistake.]

Treason or Felony may however be restored; and this exception is enlarged by Stat. 39 & 40 G. 3, c. 88, s. 12. And several other Acts have also passed, placing certain parts of the Royal Domain at the disposal of Government, with a view to its improvement, or for other purposes.

(217.) By St. 1 Eliz. c. 19, Archbishops and Bishops, and by St. 13 Eliz. c. 10, Colleges, Deans and Chapters, Hospitals, Parsons and Vicars, are prohibited from alienation, (beyond the life, it must be understood, of the Incumbent or Head of the Corporation for the time being,) except by way of lease for twenty-one years or three lives, (or a less period,) "whereupon the "accustomed yearly rent or more shall be re-"served and payable yearly during the said "term." And the leases to which the last of these two Statutes relates are further restricted by St. 18 Eliz. c. 11, which requires that, where any former lease for years is in being, it must be expired, surrendered or ended within three years next after the making of the new lease. The St. 14 Eliz. c. 11, as to houses in Towns which are affected by 13 Eliz., extends the term to forty years, but prohibits leases in reversion, and requires the burthen of repairs to be imposed upon the lessee: it also allows of absolute alienation by way of exchange. By St. 18 Eliz. c. 6, as to leases by Colleges in the Universities, and those of Winchester and Eton, one third of the whole rent is required to be reserved in corn; *viz.* "in good wheat after the rate of

Co. Litt. 45. a.

"6s. 8d. the quarter or under, and good malt "at 5s. the quarter or under(a)."

Co. Litt. 44. a. (218.) It is to be observed that, by the Common Law, Archbishops and Bishops, although they were held to be seised in fee simple in right of their Churches, could make no Assurance to bind their Successors without the concurrence of the Dean and Chapter (b); and

Co. Litt. 67. a. 343. But see Co. L. 46. a b. that Parsons and Vicars, though not properly said to be seised in fee simple, but for their lives only, might bind their Successors with the assistance of the Patron and Ordinary; and as

Co. Litt. 45. a. the above Statutes are merely restrictive, they do not enable the parties to dispense with the necessary consent.

[(a) By St. 6 Wm. 4, c. 20, (amended by c. 64,) Ecclesiastical Corporations and Persons are restrained from granting *renewals* of leases for lives, until one or more of the lives shall have dropped, and then only so as to replace the life or lives dropped, or of leases for 40, 30, or 21 years, until 14, 10, or 7 years, respectively, shall have expired; and also from granting leases for lives, where any lease has been granted for years; but with an allowance of any usual practice to renew leases for years at shorter periods, where certified, as therein provided, to have existed for ten years before the act, and to have commenced before the time of the lessor for the time being, if a corporation sole.]

[(b) See, however, St. 32 Hen. 8, c. 28, ss. 1, 2, (below, 237, 716,) by which Archbishops and Bishops are enabled to make certain leases without such concurrence. The student will find the law on the subject of leases by Ecclesiastical Persons, which is not a little intricate and perplexed, clearly set forth in 2 Bl. Comm. p. 319, &c.]

(219.) By St. 13 Eliz. c 20, (which is only partially repealed by St. 57 Geo. 3, c. 99, s. 1,) all *Charges* upon Ecclesiastical Benefices are made void. This seems to include Mortages, though made for the life only, or incumbency of the Mortgagor (*a*). Coote Mortg. 236; Doe *v.* Somerville, 6 B. & C. 126.

(220.) Anciently the Husband had power over his Wife's Land, by Feoffment or Fine, to make such an alienation of it that she could not lawfully enter upon it after his death, but must pusue her right by action; thispower is taken away by St. 32 H. 8, c. 28, s. 4. Litt. 594.

(221.) Statutes which have in view the suppression of fraud or unfair dealing between man and man, may be properly called remedial. Of this kind are those provisions of the Statute of Frauds which make the signature of the Grantor essential to the validity of a Conveyance. By the Common Law, Fraud (as well as force or *Duress*) renders void the Deed or engagement (166, 167.) 3 Bac. Ab. 294. 307; 2 Bac. Ab. 402.

[(*a*) Accordingly, it is now settled that a demise by a clergyman of his benefice, for the purpose of securing an annuity, is void. *Shaw* v. *Pritchard,* 10 B. & C. 241.

Also a warrant of attorney to confess judgment, (which is frequently given as a collateral security,) if it appears on the face of it, or of the defeasance, that the benefice is intended to be sequestered, is void. *Flight* v. *Salter,* 1 B. & Ad, 673; *Newland* v. *Watkins,* 9 Bing. 113; *Saltmarshe* v. *Hewett,* 1 Ad. & Ell. 812. But if the warrant of attorney, or the defeasance, discloses no such intention, it is unimpeachable; *Gibbons* v. *Hooper,* 2 B. & Ad. 734; *Faircloth* v. *Gurney,* 9 Bing. 622; *Colebrook* v. *Layton,* 4 B. & Ad. 578; but a sequestration under it will be good only for what is due at the time. *Britten* v. *Wait,* 3 B. & Ad. 915.]

of the person against whom it is practised; and the party's own fraudulent intention against others has a like effect as far as they are concerned: in affirmance and explanation of which latter rule, (222.) the St. 13 Eliz. c. 5, enacts, that all conveyances, &c. as well of Lands and Tenements as of Goods and Chattels made "of "malice, fraud, covin, collusion or guile," for the intent or purpose of delaying, hindering or defrauding creditors and others of their just and lawful actions, suits, debts, &c. shall be deemed and taken (only as against those persons, their heirs, executors, &c.) "to be clearly "and utterly void, frustrate and of none effect; "any pretence, colour, feigned consideration, "expressing of Use, or any other matter or "thing to the contrary notwithstanding." But it is provided, that the Act shall not extend to any estate or interest made, conveyed or assured, *upon good consideration and bonâ fide*, to any person or persons "not having at the time "of such conveyance or assurance to them "made, any manner of notice or knowledge of "such covin, fraud or collusion as is aforesaid."

3 Bac. Ab. 311; 1 Fonbl. Eq. 271 n.; Johnson v. Legard, 6 M. & S. 60.

(223.) The good consideration mentioned in this and the following Statute must be either pecuniary (or at least valuable), or that of an intended marriage which afterwards takes effect. A conveyance made in consideration of "natural "love and affection" is considered as merely *voluntary* or gratuitous.

(224.) The Statute 27 Eliz. c. 4. (made per-

petual by St. 30 El. c. 18, s. 3,) makes void, as against subsequent purchasers for money or other good consideration, all conveyances, &c. of Lands, Tenements or Hereditaments, made for the intent and purpose to defraud and deceive such Purchasers; "any pretence, colour, "feigned consideration, or expressing of any "Use or Uses to the contrary notwithstand-"ing." But it has a saving of all conveyances made "upon or for good consideration and "*bonâ fide*." It also makes void as against the same persons all conveyances "with any "clause, provision, article or condition of re-"vocation, determination or alteration, at [the "Grantor's] will or pleasure," whether such clause, &c. extend to the whole interest conveyed, or only partially affect it. But there follows a Proviso "that no lawful Mortgage, "made *bonâ fide* and without fraud or covin, "upon good consideration, shall be impeached "or impaired by force of this Act."

(225.) It has been repeatedly decided that a Voluntary Conveyance is void under this Act against a Purchaser, though he had notice of it before his purchase(*a*); the consequence of which is, (though probably never intended by the Sugd. Vend. 620, &c.

[(*a*) See, accordingly, *Doe* v. *Bottriell*, 5 B & Ad. 131; where the purchaser was actually a trustee under the prior voluntary settlement. This case, too, decided that the Act extends to copyhold lands; a point on which doubts had been previously entertained. See below, (1270.)]

Legislature,) that it is impossible to make an absolutely irrevocable free gift of lands or tenements. (226.) The Title however of the person who has made the gift is not likely to be such as a prudent person will afterwards accept; not only because there may have been a good consideration for the prior conveyance, though none appear; a fact of which any evidence may be given, in a Court of Justice, which is not excluded by the express language of the Deed; (227.) but also because a prior purchaser (for such good consideration as the Act requires) from the Voluntary Grantee will have the preferable claim, and this whether he knew the conveyance to be voluntary or not. (228.) Conveyances upon Trust, for the payment of debts already incurred, are regarded as voluntary, if there be no appearace of a contract with the Creditors on the occasion; but if any of them be parties to the Deed, it may be thought to alter the case(*a*).

Sugd. Vend. 631.

1 Phil. Ev. 555.

Sugd. Vend. 630; Smartle v. Williams, 3 Lev. 387.

Bac. Tr. 311,

Sugd. Vend. 620.

[(*a*) It must be borne in mind, however, that a voluntary settlement is good as against the settlor himself and all persons claiming under him, except purchasers for valuable consideration. When once the relative characters of trustee and *cestui que trust* are established, the settlement is no longer revocable. See *Ellison* v. *Ellison*, 6 Ves. 656. The doctrine stated in the text, and which may now be considered as fully established, (unless perhaps an exception is to be made of the case where the conveyance for the benefit of the creditors, though not executed by them, has been communicated to them,—see 2 My. & K. 495, 511,) is founded on the somewhat refined distinction that the characters of trustee and *cestui que trust* never existed be-

(229.) By 12 Ann. st. 2, c. 16, s. 1, no person shall take "directly or indirectly, for loan "of any monies, wares, merchandize, or other "commodities whatsoever, above the value of "five pounds for the forbearance of one hundred "pounds for a year, and so after that rate for "a greater or lesser sum, or for a longer or "shorter time; and all Bonds, Contracts and "Assurances whatsoever, made for payment of "any Principal or Money to be lent or cove-"nanted to be performed upon or for any Usury, "whereupon or whereby there * shall be re-"served or taken above the rate of five pounds "in the one hundred pounds, as aforesaid, shall "be utterly void (*a*)."

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* (230) It has sometimes happened that, where there was no usurious contract, an erroneous expression in a Deed has given the appearance of it. In such cases the Courts will admit evidence to be given of the mistake. *Buckley* v. *Guildbank*, Cro. Jac. 677. *Nevison* v. *Whitley*, Cro. Car. 501. *Murray* v. *Harding*, 2 Bl. Rep. 859; 3 Wils. 390.

(231.) When the interest has become due, it may, by a new agreement, be added to the Principal; but this cannot be stipulated in the original contract. 9 V. J. 271.

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tween the creditors and the trustees of the deed; but that the debtor himself was the only *cestui que trust*, and was entitled to direct the application of his own trust fund. See *Wallwyn* v. *Coutts*, 3 Keen, 707; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1, & S. C. 2 Russ. & My. 451; *Page* v. *Broom*, 4 Russ. 6; *Acton* v. *Woodgate*, 2 My. & K. 492; *Petre* v. *Espinasse*, Ib. 496; *Bill* v. *Cureton*, Ib. 503.]

[(*a*) By St. 2 & 3 Vict. c. 37, Bills and Notes at not more than twelve months, and contracts for the loan or for-

(232.) Notwithstanding the words "directly "or indirectly" in this Statute, there are cases where the lender may eventually obtain more than the repayment of his principal with interest after the rate prescribed, without violating the law. This is generally the case in loans of money upon speculation, where, by the terms of the contract, it is left to chance whether the lender shall gain or lose. Thus, when the price of the Public Stocks is so low that the purchaser of them would receive more in the Dividends than the legal interest of his purchase-money, the same benefit may be contracted for in a private loan; but then it must be subject to the same contingency of loss by a further declension of the price of Stocks; the agreement being, not to repay the money lent with interest, but to return such a sum of Stock as that money would purchase at the time of the loan, and half-yearly sums equal to the Dividends in the mean while. So, in an Agreement for Partnership in Trade, the money brought in by one Partner may be made repayable, with more than legal interest in the mean time, to arise out of the profits of the business: but here not only the money thus advanced, but all the lender's property, is ne-

7 Bac. Ab. 198. E. of Chesterfield v. Janssen, 1 Atk. 301.

Coote Morg. 303.

Fereday v. Hordern, Jac. 144.

bearance of money above £10, are exempted from the usury laws. But the Act provides "*that nothing therein con-* "*tained shall extend to the loan or forbearance of any money* "*upon security of any Lands Tenements or Hereditaments,* "*or any estate or interest therein.*" And the Act is to continue in force till the 1st of January, 1842.]

cessarily made liable to the engagements of the Firm, whatever stipulations may be entered into by the other Partners for his indemnity.

(233.) And the same principle of contingency is applicable to that most usual evasion of the law, the sale of Life Annuities; where the duration of the yearly payment being uncertain, though it far exceed the legal interest of the money advanced by the purchaser, it can never be affirmed with absolute certainty that he will be reimbursed; and though it is generally intended that the Annuity should be redeemed, at a price which is never fixed below the amount of the original purchase-money, yet, by leaving such redemption to the option of the Vendor, the contingency is still preserved: nor does the usual contract of the purchaser with other persons (as the Directors of an Insurance Office) by giving up to them a part of the proceeds of his Annuity, to secure, upon its expiration, the recovery of a sum equal to the purchase-money, produce such a certainty of repayment as to constitute Usury. (234.) The Legislature, however, has made some attempt to regulate these transactions; for which purpose, by St. 53 Geo. 3, c. 141, (which repeals the similar Act of 17 Geo. 3, c. 26, and has been amended by Stat. 3 Geo. 4, c. 92. and Stat. 7 Geo. 4, c. 75,) the Grant of any Life Annuity for money or money's worth, unless secured upon Lands of sufficient value in the Grantor's immediate power, or by the transfer of a competent sum of Stock, is re-

See Sug. Vend. App. 13; Tetley v. Tetley, 4 Bing. 214.

[Cumberland v. Kelly, 3 B. & Ad. 602. Frost v. Frost, Ib. 612. n. Walford v. Marchant, 3 My.&Cr. 550.]

quired to be registered in the Court of Chancery within thirty days, according to the Form of a Memorial prescribed in the Act; otherwise to be void: and an Index is directed to be kept in the alphabetical order of the Grantor's names. The Courts are also empowered to set aside the Grant, if the purchase-money were not duly paid.

See 1 Bing. 234. 316. 287; 2 Bing. 370; 3 Bing. 177; 6 B. & C. 165; 4 Bing. 26.

(235.) By several Acts of Parliament,* Registers (with indexes for facility of search,) are established for the Counties of York and Middlesex; and all Deeds relating to Lands in those districts are made void against subsequent purchasers or mortgagees, for valuable consideration, if not duly registered before the registration of their purchase or mortgage Deeds. Of these Statutes something more will be said in another place.

Chap. 1. sect. 7.

(236.) Enabling Statutes, for the more convenient arrangement of property, are of various kinds. Those relating to Trustees and Mortgagees, and to the property of Lunatics, have been already noticed.

(203, 204.) [202, 203, 204, 205, and the notes thereon.]

By St. 21 H. 8, c. 4, (prior to the Statute of Uses,) where a person entitled to the Use of Lands, by his last Will empowers his Executors to sell them, on the refusal of any of

(120.)

* (235. *n.*) St. 2 & 3 Ann. c. 4, and 5 Ann. c. 18, and 6 Ann. c. 35, for the West Riding: St. 6 Ann. c. 35, for the East Riding, and the Town and County of Kingston-upon-Hull: St. 7 Ann. c. 20, for Middlesex; and St. 8 G. 2, c. 6, for the North Riding. See Sugd. Ven. 662.

these Executors to join in performing the trust, the rest are enabled to execute the power by themselves.

(237.) By Stat. 32 H. 8, c. 28, s. 1, all persons of full age "having any estate of inheritance, either in fee simple or in fee tail, in "their own right, or in the right of their "Churches or Wives, or jointly with their "Wives," are enabled to make leases, "by "writing indented under seal," according to the conditions contained in s. 2. of the same Act, which is given at large in another part of this work. This power does not extend to Parsons and Vicars, as not having an estate of inheritance (*a*); but in the case of Archbishops and Bishops it makes the consent of their Deans and Chapters unnecessary. By s. 3, if the inheritance be the Wife's, she must be made a party to, and must seal the Indenture; and the rent must be reserved to the Husband and Wife and the Heirs of the Wife according to her estate.

Co. Litt. 44. Hale. Co. Litt. 44. a. n. 2.

(217.)

Chap.2.sect.2. *adfinem*.[716.]

(218.)

(207.)

(238.) By Stat. 17 G. 3, c. 53, amended by St. 21 G. 3, c. 66, and St. 5 G. 4, c. 89, Ecclesiastical Incumbents, with consent of Patron and Ordinary, are empowered to mortgage the Church property for a term of years, to secure the repayment of money borrowed for building Parsonage Houses, or repairing such as are ruinous (*b*).

[And see St. 1 Vict. c. 23.]

[(*a*) Parsons and Vicars are expressly excepted.]

[(*b*) By St. 2 & 3 Vict. c. 18, Archbishops and Bishops

(239.) The St. 55 G. 3, c. 147, (amended in some points of form by St. 1 G. 4, c. 6, and more materially by St. 6 G. 4, c. 8, and St. 7 G. 42, c. 66,) empowers Ecclesiastical Incumbents, with the consent of the Patron, and the Bishop of the Diocese, and according to the forms prescribed by the Act, to exchange their Parsonage Houses and Glebe Lands for others more valuable or commodious.

See chap. 6. sect. 3. (240.) The General Inclosure Act, 41 G. 3,
[1152, &c.] c. 109, and the Land Tax Redemption Act, 42 G. 3, c. 116, (repealing former Acts, and itself successively amended by several others, and particularly by St. 45 G. 3, c. 77; St. 50 G. 3. c. 58; St. 53 G. 3, c. 123; St. 54 G. 3, c. 173;
[1130, 1131.] and St. 57 G. 3, c. 100,) also confer many very ample powers for similar purposes of convenience.

(241.) Other Statutes there are which empower certain persons to dispose of the estates of others, under particular circumstances, for the satisfaction of their debts.

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are empowered, with the consent, in the case of an Archbishop, of the other Archbishop and the First Lord of the Treasury, and in the case of a Bishop, of the Archbishop of the Province and the First Lord of the Treasury, to raise money on mortgage of the possessions of their Sees, for rebuilding or improving their Palaces or mansions; or for building new ones; or for purchasing any freehold mansions for residence, or land for sites. The amount to be raised is not less than £2000, and not more than three years' net income of the See. The interest is to be paid half-yearly, and the principal by instalments of a thirtieth part yearly, from the end of the third year.]

The most important of these is the Bankrupt Act of 6 G. 4, c. 16, which has repealed the old statutes relating to Bankruptcy, and consolidated their provisions with some alteration. Having determined what persons, in respect of their employments, are capable of becoming Bankrupts, (s. 2,) it proceeds (s. 3, & seqq.) to enumerate the Acts by which they may become so. One of these is the Trader's "making "any fraudulent Grant or Conveyance of any "of his Lands, Tenements, Goods or Chattels, "with intent to defeat or delay his Creditors." But by s. 4, a Conveyance or Assignment by Deed, to a Trustee or Trustees, of all his estate and effects for the benefit of all his creditors, if be executed according to the forms there escribed, is not an Act of Bankruptcy, unless a Commission issue within six months afterwards. This Commission (*a*) (s. 12, & seqq.) is

[(*a*) But now, by St. 1 & 2 Wm. 4, c. 56, entituled "An Act to establish a Court in Bankruptcy," (amended and extended in certain respects by subsequent acts,) a *Fiat* is issued by the Lord Chancellor in lieu of such Commission, authorizing the creditor to proceed in the Court of Bankruptcy, or elsewhere before persons appointed by the Fiat. (s. 12.) Commissioners are appointed for the Court of Bankruptcy, (s. 1,) and others for the several districts in the country, to whom all Fiats must be sent. (s. 14.) All the provisions of former acts relating to Bankrupts, except as may be otherwise directed by this act, are made applicable to fiats and to the proceedings under them; (s. 16;) so that the St. 6 Geo 4, c. 16, is still the principal enactment on this subject.]

issued under the Great Seal, upon Petition of Creditors to the Chancellor; and the Commissioners thereby appointed are, upon sufficient evidence of the facts, (s. 24,) to adjudge the Trader a Bankrupt; after which, by s. 26, they may proceed, though he happen to die. By s. 61, the Creditors are to choose persons to be Assignees of the Bankrupt's property (*a*). And by s. 64,

(242.) (*b*) "The Commissioners shall, by Deed

[1 & 2. W. 4 c. 56.] [(*a*) By s. 22, official assignees are appointed, one of whom is to act in every Bankruptcy prosecuted in the Court of Bankruptcy, together with the assignees to be chosen by the creditors; and until such choice, he is to be deemed a sole assignee.]

[(*b*) This conveyance is by the late act rendered unnecessary. It enacts, (s. 26,) "That where any person shall "have been adjudged a Bankrupt, all such present and "future real estate of such Bankrupt, whether in the United "Kingdom of Great Britain and Ireland, or in any of the "dominions, plantations, or colonies belonging to His "Majesty, as by the said recited Act," (St. 6 Geo. 4, c. 16,) "is directed to be conveyed by the commissioners to the "assignees, shall vest in such Bankrupt's assignee or as-"signees for the time being by virtue of his or their "appointment, without any deed of conveyance for that "purpose; and as often as any such assignee or assignees "shall die or be lawfully removed or displaced, and a new "assignee or assignees shall be duly appointed, such of the "aforesaid real estate as shall remain unsold or unconveyed, "shall, by virtue of such appointment, vest in the new as-"signee or assignees, either alone, or jointly with the existing "assignees, as the case may require, without any convey-"ance for that purpose." The Act provides, that where [235, 627, &c.] the conveyance would have required to be registered, a

" indented and inrolled in any of his Majesty's " Courts of Record, convey to the said As- " signees, for the benefit of the Creditors, all " lands, tenements and hereditaments (except " Copy or Customary hold,) in England, Scot- " land, Ireland, or in any of the dominions, " plantations, or colonies belonging to His " Majesty, to which any Bankrupt is entitled; " and all interest to which such bankrupt is " entitled in any of such lands, tenements or " hereditaments, and of which he might accord- " ing to the Laws of the several countries, domi- " nions, plantations or colonies, have disposed; " and all such lands, tenements and heredita- " ments, as he shall purchase, or shall descend, " be devised, revert to, or come to such Bank- " rupt before he shall have obtained his Certi- " ficate, and all Deeds, Papers and Writings " respecting the same; and every such Deed " shall be valid against the Bankrupt, and " against all persons claiming under him." Copyhold property (c), which is exempted out of

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certificate, purporting to be under the seal of the Court of Bankruptcy, of the appointment of the assignees, shall be registered. And such certificate shall be received as evidence of such appointment in all Courts. (ss. 27, 28, 29.)

As to estates tail and base fees of the Bankrupt, see below, 711, and *n*.]

[(*c*) Copyholds are in effect exempted also out of the 26th section of the late Act; and the provisions of the former Act, 6 Geo. 4, c. 16, respecting them, are therefore still applicable. (See 1299.) And as to estates tail and base fees in Copyholds belonging to the Bankrupt, see 1299, *n*.]

this section, is provided for in another, which
Chap. 7. shall be inserted in its proper place.

(243.) By section 66, the Lord Chancellor is empowered, on petition, to vacate the Conveyance (*a*), and the Commissioners to make a new one; but this is not to affect the Title of any purchaser under any Conveyance prior to the Chancellor's Order. The object of this section is to provide for the case of the absence or other disability of any of the Assignees.

(244.) By section 70, the Assignees may take advantage of any condition or power of redemption annexed to any former conveyance by the Bankrupt, as fully as the Bankrup himself might have done.

(245.) By section 73, it is enacted, that if any Bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed to any of his children, or any other person, any other hereditaments, &c. the Commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the Bankrupt, and such children and persons as aforesaid, and against all persons claiming under him.

(246.) By section 77, " All Powers vested in " any Bankrupt which he might legally execute " for his own benefit (except the right of nomi-

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[(*a*) This provision is rendered nugatory under the late Act. See the 26th section. (242, *n*. (*b*).)]

"nation to any vacant Ecclesiastical Benefice) "may be executed by the Assignees, for the "benefit of the Creditors, in such manner as "the Bankrupt might have executed the same."

(247.) By section 78, the Lord Chancellor is empowered, "upon the petition of the Assig-"nees or of any purchaser from them, of any "part of the Bankrupt's Estate, if such Bank-"rupt shall not try the validity of the Commis-"sion, or if there shall have been a Verdict at "Law establishing its validity, to order the "Bankrupt to join in any conveyance of such "estate, or any part thereof; and if he shall not "execute such Conveyance within the time "directed by the Order, such Bankrupt, and all "persons claiming under him, shall be stopped "from objecting to the validity of such Con-"veyance; and all Estate, Right or Title "which such Bankrupt had therein, shall be as "effectually barred by such order as if such "Conveyance had been executed by him."

Thus the purchaser is relieved from all apprehension of the Commission being superseded or called in question, which would destroy or throw a doubt upon his title. 8 V. J. 534; 2 Swanst. 291.

(248.) It is to be observed, that if a Commission be issued against any Trader, and he be thereupon adjudged a Bankrupt, he becomes so from the time when the Act of Bankruptcy on which the Commission is grounded was committed; so that the Power of the Commissioners overreaches and annuls all conveyances

made by him since that time. And therefore by sect. 81 it is enacted,

(249.) That all Conveyances by, and all Contracts and other Dealings and Transactions by and with any Bankrupt, *bonâ fide* made and entered into (*a*) more than two calendar months before the date and issuing of the Commission against him, shall be valid, notwithstanding any prior Act of Bankruptcy by him committed; provided the person or persons so dealing with such Bankrupt had not, at the time of such Conveyance, Contract, Dealing or Transaction, notice of any prior act of Bankruptcy by him committed: Provided also, that where a Commission has been superseded, if any other

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[(*a*) For the further protection of purchasers, it is enacted by St. 2 Vict. c. 11, s. 12, "That all conveyances "by any Bankrupt, *bona fide* made and executed before the "date and issuing of the Fiat against such Bankrupt, shall "be valid, notwithstanding any prior act of Bankruptcy by "him committed; provided the person or persons to whom "such Bankrupt so conveyed, had not at the time of such "conveyance, notice of any prior act of Bankruptcy by "him committed." And by St. 2 Vict. c. 29, it is further enacted, that all contracts, dealings, and transactions by and with any Bankrupt, and all executions against his lands, *bona fide* made and entered into or executed before the date and issuing of the fiat, shall be valid, notwithstanding any prior act of Bankruptcy by him committed; provided the person or persons so dealing with the Bankrupt, or on whose account such execution shall have issued, had not, at the time of such contract, dealing, transaction, or execution, notice of any prior act of Bankruptcy by him committed.]

Commission shall issue against any person or persons comprised in such first Commission, within two calendar months next after it shall have been superseded, no such Conveyance, Contract, Dealing or Transaction, shall be valid, unless made or entered into more than two calendar months before the issuing the first Commission.

(250.) And by section 86, " That no pur- " chase from any Bankrupt, *bonâ fide*, and for " valuable consideration, where the purchaser " had notice at the time of such purchase of an " act of Bankrupt by such Bankrupt com- " mitted, shall be impeached by reason thereof, " unless the Commission against such Bank- " rupt shall have been sued out within twelve " calendar months after such act of Bank- " ruptcy (*a*)." [E. of Granville v. Danvers, 7 Sim. 121.]

(251.) And for the further security of Purchasers, the 87th section provides " That no " title to any Real or Personal Estate sold under " any Commission, or under any Order in Bank- " ruptcy, shall be impeached by the Bankrupt, " or any person claiming under him, in respect " of any defect in the suing out of the Com- " mission, or in any of the proceedings under the " same, unless the Bankrupt shall have com- " menced proceedings to supersede the said " Commission, and duly prosecuted the same,

[(*a*) This clause is re-enacted verbatim, 2 Vict. c. 11, s. 13.]

"within twelve calendar months from the issu-"ing thereof(*a*)."

[Sims v. Simpson, 1 Bing. N. C. 306.] (252.) The Acts for the Relief of Insolvent Debtors to whom the Bankrupt Laws do not extend, have hitherto been only temporary and experimental. They require a *cessio bonorum* from the Debtor, but it is made by his own Deed; which, however, is rendered effectual beyond the ordinary rules of Law by St. 7 G. 4, c. 57, s. 11, the Enactment now in force(*b*).

(253.) By St. 13 El. c. 4, the Lands and Tenements of Treasurers, Receivers, Collectors, &c. under the Crown, are charged with their arrearages from the time of their entry upon office. And by Statute 25 G. 3. c. 35, the Court of Exchequer is authorized to order a sale of the Lands and Tenements so charged; and his Majesty's Remembrancer in that Court, or his Deputy, is empowered to convey the same accordingly by a Deed of Bargain and Sale to be enrolled in the same Court. The effect of these Statutes is such, that a Purchaser of real property from an Accountant to the Crown can

See Sug. Vend. 692. 430.

[(*a*) By St. 2 & 3 Wm. 4, c. 114, it is enacted, that no fiat, adjudication of Bankruptcy, appointment of assignees, or certificate of conformity, shall be received in evidence, unless entered of record in the Court of Bankruptcy. (s. 8.) And the production of any such document, sealed with the seal of the Court of Bankruptcy, shall be received as evidence of such document having been entered of record. (s. 9.)]

[(*b*) But see now the Statute 1 & 2 Vict. c. 110.]

never be safe in his possession, until the Vendor be out of Office and have discharged his arrears. But this mischief is in some degree remedied by St. 1 & 2 G. 4, c. 121 (*a*).

Sect. 4.—*Of Alienation by Will* (*b*).

(254.) By the Custom of Kent, and of some other parts of England, and particularly in North Wales, Lands and Tenements were always disposable by Will: but this was contrary to the general rule of the Common Law. And as we have seen, the Court of Chancery Cro. Car. 562. Co. Litt. 111. b.

[(*a*) The mischief has been still further remedied, if not removed, though *prospectively* only, by St. 2 Vict. c. 11, which provides for the future, that all debts, &c. to the Crown, in order to affect the Lands of the debtor, must be entered in "The Index to debtors and accountants to the "Crown," to be kept by the Senior Master of the Court of Common Pleas. (s. 3.) In the same Index may also be entered, any *Quietus* obtained by such debtor or accountant. (s. 9.)

And the Treasury is authorized, upon payment into the Exchequer, or on other terms, as they may think proper, to exonerate the Purchaser from the debt to the Crown. (s. 10.)]

[(*b*) The subject of this section has been most extensively altered by the late Act, 1 Vict. c. 26. All the provisions of this Act are, however, *prospective*, only; and s. 34 declares, that the Act shall not extend to any will *made before the first day of January*, 1838. This must be constantly kept in view, and it will of course still be necessary for the student to make himself acquainted with the law on this subject, as it stood before the Act.]

(120.) allowed the testamentary alienation of Uses; a privilege which the Statute of Uses was calculated to destroy. (255.) But this proving inconvenient, by Stat. 32 H. 8, c. 1, and afterwards more explicitly by Stat. 34 & 35 H. 8, c. 5, it was enacted that "(*a*) All and singular "person and persons having a sole estate or in-"terest in fee simple, or seised in fee simple in "* coparcenary, or in common, in fee simple, of "and in any manors, lands, tenements, rents or "other hereditaments, in possession, reversion "or remainder, or of rents or services incident to "any reversion or remainder," (subject to certain restrictions in respect of Tenure, which have been removed by Stat. 12 Car. 2, c. 24,) "shall have full and free liberty, power and "authority to give, dispose, will or devise, to

* (255. *n.*) Coparcenary is where real property descends to females or their representatives as coheirs; of which more will be said in the next section.

[(*a*) These two acts are repealed by St. 1 Vict. c. 26, s. 2, and it is enacted, in the 3rd section, "That it shall "be lawful for every person to devise, bequeath, or dis-"pose of, by his will executed in manner hereinafter re-"quired, all real estate and all personal estate, which he "shall be entitled to, either at law or in equity, at the time "of his death, and which if not so devised, bequeathed, "or disposed of, would devolve upon the heir at law or "customary heir of him, or if he became entitled by de-"scent, of his ancestor, or upon his executor or adminis-"trator." And it then goes on to specify certain particular cases and species of interest to which the power thereby given shall extend. These will be noticed hereafter. See below, 257, *n.* 258, *n.* 259, *n.* 733, *n.* 1417, *n.*]

"any person or persons (except bodies politic "and corporate) by his last will and testament "in writing, or otherwise by any act or acts "lawfully executed in his life, by himself solely, "or by himself and other jointly severally or "particularly, or by all those ways, or any of "them, as much as in him of right is or shall "be, all his said manors, lands, tenements, rents "and hereditaments, or any of them, or any "rents, commons or other profits or commo- "dities out of or to be perceived of the same, "or out of any parcel thereof, at his own free "will and pleasure." But it is further de- clared in s. 14, "That wills or testaments made "of any manors, lands, tenements, or other here- "ditaments, by any woman covert (a), or per- "son within the age of twenty-one years (b), "idiot, or by any person *de non* sane memory, "shall not be taken to be good or effectual in "the Law."

(256.) It is to be observed that Joint-tenants are not included in these Statutes. Nor, under Litt. 287.
the Common Law, was a Joint-tenant of Lands devisable by Custom allowed to devise his share. The rule is therefore universal, that the right (36.)

[(a) And under the recent act, "No will made by any "married woman shall be valid, except such a will as might [207, 903.]
"have been made by a married woman before the passing "of the Act." (s. 8.)]

[(b) And under the recent act, "No will made by any "person under the age of twenty-one years shall be valid." (s. 7.)]

of survivorship between Joint-tenants is preferred to their last Wills(*a*).

(257.) With respect to the construction of the words "having an estate or interest in possession, reversion or remainder," it has been decided, that an interest, which at the time of making the Will is contingent, may yet be devised, if it might otherwise descend to the Testator's heir(*b*). (258.) Such a contingent interest however must be distinguished from the mere hope or possibility of succession which the heir of a person seised in fee simple may be supposed to have in the lifetime of the latter; and it is also necessary that the Testator should be ascertained as the person in whom, or in whose heirs, the interest must vest, if it vest at all(*c*). For real property, acquired after the Will is made, whether by descent or

Roe *v.* Jones, 1 H. Bl. 30; 3 T. R. 88; Fearne, C. R. 363, &c.

(47.

(48.)

See Doe *v.* Tomkinson, 2 M. & S. 165.

[1 Vict. c. 26.] [(*a*) And the same rule prevails in wills under the recent act; for the third section gives power to dispose of such real estate only as would devolve upon the heir. (255, *n.* (*a*).)]

[(*b*) And the late act expressly enacts, (in s. 3,) that the power thereby given shall extend "to all contingent, "executory, or other future interests in any real or personal "estate, whether the testator may or may not be ascertained "as the person or one of the persons in whom the same "respectively may become vested, and whether he may be "entitled thereto under the instrument by which the same "respectively were created, or under any disposition thereof "by deed or will."]

[(*c*) But see now s. 3 of 1 Vict. c, 26, as cited in the foregoing note.]

purchase, cannot be devised by anticipation (*a*).

(259.) Nor does the enactment extend to estates which are divested and converted into rights (*b*), whether at the time of making the Will, or only at the Testator's death. Goodright *v.* Forrester, 8 East, 552; 1 Tau. 578; Att. Gen. *v.* Vigor, 8 V. J. 256.

(260.) By the 5th and 6th sections of the Stat. of Frauds (29 Car. 2, c. 3,) it is enacted,

5. (*c*) "That all Devises and Bequests of

[(*a*) But the law is otherwise in wills under the recent act; for, by s. 3, the power of disposition is also extended to such "real and personal estate as the testator may be "entitled to at the time of his death, notwithstanding that "he may become entitled to the same subsequently to the "execution of his will."] [1 Vict. c. 26.]

[(*b*) In wills under the recent act, the power of disposition extends to "all rights of entry for conditions broken, "and other rights of entry." (s. 3.)]

[(*c*) These sections of the Statute of Frauds are repealed by the late act, and it is enacted in s. 9, "that no will shall "be valid unless it shall be in writing, and executed in "manner hereinafter mentioned, (that is to say,) it shall be "signed at the foot or end thereof by the testator, or by "some other person in his presence and by his direction; "and such signature shall be made or acknowledged by "the Testator in the presence of two or more witnesses "present at the same time, and such witnesses shall attest "and shall subscribe the Will in the presence of the Testa-"tor; but no form of attestation shall be necessary."

And s. 20 enacts, "That no will or codicil, or any part "thereof, shall be revoked otherwise than as aforesaid," (that is, by the marriage of the Testator; see s. 18, stated below, 269, n.) "or by another will or codicil executed in "manner hereinbefore required, or by some writing declar-"ing an intention to revoke the same, and executed in the "manner in which a will is hereinbefore required to be ex-

"any Lands or Tenements devisable either by "force of the Statute of Wills, or by this Sta- "tute, or by force of the Custom of Kent, or "the custom of any borough, or any other par- "ticular custom, shall be in writing, and signed "by the party so devising the same, or by some "other person in his presence and by his ex- "press directions, and shall be attested and "subscribed in the presence of the said De- "visor by three or four credible witnesses, or "else they shall be utterly void and of none "effect."

[Baker v. Dening, 8 A. & E. 94.]

(261.) 6. (*a*) "And moreover, no Devise in "Writing of Lands, Tenements or Heredita- "ments, nor any clause thereof, shall be revo-

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"ecuted, or by the burning, tearing, or otherwise destroy- "ing the same by the Testator, or by some person in his pre- "sence and by his direction, with the intention of revoking "the same." And it is further enacted, by s. 21, "that no "obliteration, interlineation, or other alteration, made in any "will after the execution thereof, shall be valid or have "any effect, except so far as the words or effect of the will "before such alteration shall not be apparent, unless such "alteration shall be executed in like manner as hereinbefore "is required for the execution of the will: but the will, "with such alteration as part thereof, shall be deemed to "be duly executed, if the signature of the Testator and "the subscription of the witnesses be made in the margin, "or on some other part of the will opposite or near to such "alteration, or at the foot or end of or opposite to a me- "morandum referring to such alteration, and written at "the end or some other part of the will."]

[(*a*) See foregoing note.]

" cable, otherwise than by some other Will or
" Codicil in Writing, or other writing declaring
" the same, or by* burning, cancelling, tear-
" ing or obliterating the same by the Testator
" himself, or in his presence and by his direc-
" tions and consent; but all Devises and Be-
" quests of Lands and Tenements shall remain
" and continue in force until the same be burnt,
" cancelled, torn or obliterated by the Testa-
" tor, or his directions in manner aforesaid, or
" unless the same be altered by some other
" Will or Codicil in writing, or other writing
" of the Devisor signed in the presence of three

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* (262) The cancellation, &c. must be intentional; if accidental, it is no revocation; though if all evidence of the contents of the Will happen to be destroyed, it must of course fail of its effect. Cowp. 52. 92. And though the Testator appears to be the proper judge of the sufficiency of the destructive act, it is necessary that that act should have been completed according to his purpose (*a*). *Doe* v. *Perkes*, 3 B. & A. 489. [See too *Doe* v. *Harris*, 6 A. & E. 209, and 8 A. & E. 1.]

[(*a*) The recent act, it will be observed, mentions neither cancellation nor obliteration as a mode of revoking a will, but requires a complete destruction of the instrument, unless revoked by some of the other means specified. The 21st section seems to apply only to cases of *partial alteration*, and it would seem that the entire will could not be revoked by cancellation; though if it were accompanied by a duly executed memorandum, *sufficiently declaring an intention to revoke*, the will would be revoked; but rather by virtue of the memorandum under the 20th section, than by means of the cancellation under the 21st.] [1 Vict. c. 26.]

"or four witnesses, declaring the same; any "former Law or usage to the contrary not- "withstanding."

(263.) Since this last Statute it has been most usual for the Testator to sign his Will in the presence of three witnesses, who immediately attest his signature by the subscription of their own names. But there is no absolute necessity that the witnesses should subscribe at the same time, or in the presence of one another; nor perhaps that the Testator's signature should be made in the presence of any of them, if it can be otherwise proved; for his calling upon the witnesses to attest the instrument as his Will sufficiently enables them to authenticate it. And it seems to be settled that the words "signed in the presence of three or four wit- "nesses," which occur in s. 6, are to be referred only to the "other writing" there mentioned; meaning such an instrument of revocation as contains no new disposition, and is therefore neither Will nor Codicil (*a*).

Ellis *v.* Smith, 1 V. J. 11. and n. ib.; Westbeech *v.* Kennedy, 1 V. & B. 362.

(264.) In order to ensure the *credibility* (*b*)

[(*a*) Under the new act, of course the directions contained in s. 9, stated above, must be complied with. It requires that two or more witnesses shall attest and shall subscribe the will, but declares that no form of attestation shall be necessary. It would seem, therefore, that the mere signature or subscription of their names by the witnesses, would be sufficient; but it will be prudent to add a formal clause of attestation. See 2 Sugd. V. & P. 252.]

260. n. (*c*).]

[(*b*) It will be observed that the attestation required by s. 9, is to be by *two or more witnesses*, simply, without re-

of the witnesses, the Stat. 25 Geo. 2, c. 6, deprives them of all benefit which the Will may confer, unless by a provision for payment of the Testator's debts (*a*). (265.) It seems however that if there be a devise of Real Property to the *wife* of one of the witnesses, which is a case not provided for by that Statute (*b*), the husband in presumption of Law is not credible; and therefore, if there be not three other witnesses, the Will is void. (266.) But a mere legatee of personal property (not being a subscribing witness) has been allowed to give his testimony to the sanity of the Testator in a case where Real Property was concerned: for the establishment of the Will in a Court of Common Law, could have no influence on the

Hatfield *v.* Thorp, 5 B. & A. 589.

Doe *v.* Teage, 5 B. & C. 335.

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quiring *credible* witnesses, as under the old law. And s. 14 further enacts, that the will shall not be invalid on account of the incompetency of any person attesting it to be admitted a witness to prove the execution thereof. So that it seems to be unnecessary that the persons attesting the will should be credible or competent as *witnesses*, though the act calls them such.]

[(*a*) This statute is now repealed by the recent act, which however re-enacts the provision, and extends it to the case of any benefit (other than a provision for payment of debts) conferred by the Will on the *wife* or *husband* of the person attesting the will. (s. 15.)*] [1 Vict. c. 26.]

[(*b*) See the last note.]

[* By s. 16, a creditor whose debt is charged by the will, and who attests, or whose wife or husband attests the will, is a competent witness to prove the execution or the validity or invalidity of the will; and by s. 17, no person is incompetent as a witness, for such purposes, on account of his being executor of the will.]

Ecclesiastical Court, which alone must decide on the validity of the Legacy.

(267). Notwithstanding the peremptory language of the 6th Section of the Statute of Frauds, a Will may be revoked in various ways, indirectly, or by operation of law. Thus, in the first place, it is plain that the Will must be deprived of its effect as to any subject which is disposed of by the Testator in his lifetime. But this principle has been carried to excess;

Goodtitle *v.* Otway, 1 B. & P. 576.

and it is now undoubted Law that a* conveyance of Lands or Tenements revokes a former Will so far as it relates to them, even though the entire use upon such conveyance result to

[Hodges *v.* Green, 4 Russ. 28.]

the Testator, so that he possesses the same estate which he had before (*a*). (268.) An exception

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(107.) * (267. *n.*) Even a defective Recovery, which takes effect by Estoppel only. *Doe* v. *Bp. of Landaff,* 2 N. R. 491.
(215.) But not a Deed of Conveyance, which is absolutely void by Statute. *Matthews* v. *Venables,* 2 Bing. 136; and see *Eilbeck* v. *Wood,* 1 Russ. 564.

[1 Vict. c. 26.] [(*a*) The law is now altered in this respect, for the recent Act provides, (s. 23,) " That no Conveyance, or other act " made or done subsequently to the execution of a will of " or relating to any real or personal estate, therein com- " prised, except an act by which such will shall be revoked " as aforesaid, shall prevent the operation of the will with " respect to such estate or interest in such real or personal " estate as the Testator *shall have power to dispose of by* " *will at the Time of his death.*"

And further, (s. 24,) " That every will shall be construed, " with reference to the real estate and personal estate com-

however, has been made to this rule in the case where a Coparcener or Tenant in Common, having made his will, afterwards joins with his companion in a conveyance of the lands for the purpose of effecting a partition. As, if *A.* and *B.* be Tenants in Common of White Acre and Black Acre, and *A.* by his Will devise his Moiety of both Acres; and then *A.* and *B.* join in a conveyance of both Acres to *C.* in fee, to the use of *A.* and his heirs as to White Acre, and to the use of *B.* and his heirs as to Black Acre: it has been decided that White Acre will pass by the Will of *A.*, and yet there has not only been a conveyance of the thing devised, but a Conveyance which has entirely changed the property of *A.* as to one moiety: but as it was in the power of *B.*, by suing out a Writ of Partition, to compel a similar change, the act of *A.* may be regarded as not absolutely voluntary, and therefore no intention to revoke his will can be inferred from it.

Luther *v.* Kidby, 3 P. Wms. 169. n.

8 V. J. 281.

" prised in it, to speak and take effect as if it had been ex-
" ecuted *immediately before the death of the Testator*, unless
" a contrary intention shall appear by the will."

So that, in a case under the Act, the estate would pass by the will. And even though the testator had actually sold and disposed of the estate, and afterwards repurchased it; or if after the making of the will he purchased other estates; all such after-purchased estates would pass by the will, if the language of the will, speaking at the testator's death, were sufficient to comprise them.]

7 Bac. Ab. 363. &c.; 2 Fonbl. 353. n.; and see Note by Eden to 2 Bro. C. C. 540; Doe v. Barford, 4 M. & S. 10.

(269.) A total change of circumstances, for which the Will has not provided, is also an implied revocation (*a*). Marriage and the birth of a child whom the will would disinherit, may be considered as together operating a total change; but not marriage alone in the case of a man (*a*); nor, it seems, the birth of such child, if

2 Bro. C. C. 544.

the Will were made after marriage. (270.) The Will of a female is always revoked by her marriage, on the ground that it would otherwise, by her own act, become irrevocable, which is contrary to the nature of the instrument; though it may become so by the act of God,

[(*a*) In the late case of *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14, it was decided by all the Judges, that marriage and the birth of a child caused a revocation of a prior will, not on the ground of a presumed alteration of intention, but *by a tacit condition annexed by law*; so that evidence of a Testator's intention that his will should remain in force, notwithstanding this alteration in his circumstances, was inadmissible. This certainly places the old rule of law on a more satisfactory footing; and the legislature has adopted the same principle, but with a material extension; for the recent act declares, 1st., "that every will "made by a man or woman shall be revoked by his or her "marriage;" (except a will made in exercise of a power of appointment, when the estate would not, in default of appointment, have passed to the real or personal representative, or next of kin;) and 2nd, "that no will shall "be revoked by any presumption of an intention on the "ground of an alteration in circumstances." (ss. 18, 19.)

So that in cases under the recent act, a subsequent marriage causes a revocation of the will, whether there be issue or not.]

as by insanity supervening and continuing till death.

(271.) Connected with the subject of Revocation, is that of republication of a Will; the effect of which is not only to * restore its validity, if revoked, but for most purposes to alter its date (*a*). This, in altered circumstances, may be very material; general expressions may acquire a new import; and even proper names may become applicable to other individuals; lands also which were acquired subsequently to the original publication of the Will, but before the republication, will, if they are either

Beable v. Dodd, 1 T. R. 193; Perkins v. Micklethwaite, 7 Bac. Ab. 321; 1 P. Wms. 274; Cowp. 132.

* (272.) The validity of a Will which has been revoked by a subsequent Will, but not intentionally destroyed or cancelled, (*Burtonshaw* v. *Gilbert*, Cowp. 49,) may be restored by the simple revocation or destruction of the second Will; (*Goodright* v. *Glazier*, 4 Burr. 2512; Cowp. 92;) but this is not properly a Republication.

(273.) If between the making of the Will and of the Codicil an Act of Parliament has passed by which the Will, if subsequently made, would be void, the Republication does not bring it within the Act. *Willet* v. *Sandford*, 1 Ves. 178. 186.

[(*a*) By s. 22 of the recent act, no will or codicil if revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as the Act requires, and shewing an intention to revive the same; and when a will or codicil, partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.] [1 Vict. c. 26.]

specified, or can be included in the description, be thus made to pass. (274.) The most remarkable decision on this head is, that a Codicil, (which is a kind of postscript or supplemental instrument,) if signed and attested according to the Statute of Frauds, will, although relating to the Testator's personal estate only, amount to a republication of his Will, which affects his real estate (*a*).

Pigott *v.* Waller, 7 V. J. 98; Guest *v* Willasey, 2 Bing. 429; 3 Bing. 614.

[Hughes *v.* Thomas, 3 My. & K. 666.]

4 Bac. Ab. 334.

(275.) Lapse is a Failure of the Devise in consequence of an event unconnected with the Will, namely the death of the Devisee in the lifetime of the testator. And though the devise be to *A.* and his heirs, yet if he die before the Testator, his heirs will not take the land; because the heirs of *A.* were mentioned only to denote what estate *A.* himself should take, *viz.* a fee simple if he were living at the time when the will must take effect (*b*). (276.) If the devise

3 B. & P. 22.

[(*a*) And even, in some cases, supply the want of formal execution of the Will. *Utterton* v. *Robins*, 1 A. & E. 423. And see *Monypenny* v. *Bristow*, 2 Russ. & M. 117; *Gordon* v. *Lord Reay*, 1 Sim. 274.]

[(*b*) And the same thing would happen if the devise were to *A.* and the heirs of his body, or even to *A.* for life, with remainder to the heirs of his body, either of which would be an estate tail to *A.* This frequently produced great hardship, and was generally contrary to the Testator's real intentions. The recent Act has provided, that where a person to whom an estate tail is devised, dies before the Testator, leaving issue inheritable under the entail, and any such issue is living at the death of the Testator;—and also, where any person, being a child or other issue of the Testator, to whom an interest is devised or bequeathed not determin-

[1 Vict. c. 26.]

be to two or more as Joint-tenants, the whole will go to him or them who shall survive the Testator. (277.) But it is otherwise as to Tenants in Common, (278.) unless the persons be described in general Terms only and as constituting a class. Doe v. Sheffield, 13 East, 526; Doe v. Over, 1 Tau. 26.

(279.) An interest which has lapsed descends to the heir of the Testator, notwithstanding a general residuary devise contained in the Will (a). Where the first devise is originally void, the case has been thought to be distinguishable; but here too there have been decisions in favour of the heir (a). Doe v. Underdown, Willes, 293; Doe v. Scott, 3 M. & S. 343. 13 East, 536, 537. Gibbs v. Rumsey, 2 V. & B. 294; Jones v. Mitchell, 1 Sim. & Stu. 290.

(280.) Where the land is effectually devised, there can be no Resulting Use for the Heir; for every disposition by Will is said to imply a Consideration: which it clearly does, if by that word be meant any thing which induces a preference of the Devisee to the Heir. (281.) And when Uses are actually declared by Will, it has Bro. Ab. Fef. al. Us. pl. 10; 1 Sand. Us. 241; Sugd. Pow. 134, &c.

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able at or before the death of such person, dies before the Testator leaving issue, and any such issue is living at the death of the Testator;—in either case, the devise or bequest shall not lapse, but shall take effect as if the person had died immediately after the Testator, unless a contrary intention appears by the will. (ss. 32, 33.)]

[(a) But in cases under the recent act, unless a contrary intention shall appear by the will, the estate comprised in any devise which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will (s. 25.)]

been disputed whether the Statute of Uses is applicable to them. For though that Statute has very comprehensive words for including every seisin to uses, however it may originate, yet it has been thought that a devise by Will is not within its purview: because, not having been yet introduced into the general system of law, it could not have been contemplated by the legislature of 27 Hen. 8. However, as the intention of the Testator, appearing in his Will, is the rule of its operation, there can be no doubt that where the ordinary language of deeds is adopted in a Will for the manifest purpose of ascertaining in whom the legal estate shall vest, the effect will correspond to that purpose. And the better opinion seems to be, that the Statute will always operate in furtherance of the intention though not in opposi-
(154, 155.) tion to it. (282.) Whence it follows that the question which has been discussed concerning Shifting Uses to arise out of a seisin united with the beneficial ownership can have no place in the interpretation of a Will. For to this posthumous mode of conveyance the law has indulged the creation of future and contingent estates,
Fearne, C. R. 390. under the name of Executory Devises, according to a system analogous in other respects to that of Springing and Shifting Uses, but with this difference, that the gift by Will is allowed to be direct, and independent of the interposition of a third person, which the Statute of Uses

requires. And thus the question of *Scintilla Juris* may also be avoided. (162.)

(283.) The anxiety of the Courts to give effect to the intention of the Testator induced them in early times, in their decisions upon devises by Custom, to dispense for the most part with those technical words which are required for the limitation of Estates by Deeds, and the same practice has been generally followed since the Statute of Wills. Reasonable, however, as the indulgence may at first sight appear, the inconvenience which has ensued from it is far more extensive and important than the mischief which it was intended to prevent. The mischief of greater strictness would have been, that the right conferred by the Statute would be forfeited by ignorance, while the inaccuracies of the Testator would have redounded to the benefit of his heir. The actual inconvenience has been, the continual vexation of our Judges of Law and Equity with nonsense which they must interpret, and absurdities which they must make consistent; the consequent accumulation of precedents, which sometimes assist and sometimes hamper their endeavours; and the uncertainties of right, which no private learning or judgment can decide. It must be owned, however, that no part of our legal system displays more ingenuity than that which relates to the interpretation of Wills, of which only a few outlines can be expected in these pages. The observations here following Litt. 586.

relate to the subject of the present Chapter, Estates in Fee Simple.

Denn v. Mellor, 5 T. R. 558; 2 B. & P. 247.

(284.) In the first place, it is clear that a Devise of Lands, Tenements or Hereditaments, or the Rest and Residue of the Testator's Hereditaments, to *A.* without any expression or hint of the Estate which he is to take therein, gives him only an Estate for his life (*a*). It has been remarked that this rule generally contradicts the Testator's intention; and there seems to have been no good reason for its original introduction, but such as would have applied equally to other technical rules.

Right v. Sidebotham, Doug. 730; Denn v. Gasken, Cowp. 657.

(285.) Nor will the bequest of other property to the Testator's heir at law be a sufficient indication of an intention to disinherit him of the reversion of that which is given to *A.*(*a*).

Hogan v. Jackson, Cowp. 299; Holdfast v. Marten, 1 T R. 411; Chichester v. Oxenden, 4 Tau. 176; Roe v. Wright, 7 East, 259; Harding v. Gardner, 1 B. & B. 72.

(286.) But a devise of all the Testator's *Estate*, or *Interest*, or *Property* in any Lands, &c. to *A.* will give him the Fee. So, all the *rest of his Estate*, or of his *Effects, both real and personal*. (287.) So his Estate at or of such a place, or called by such a name, or consisting of so many acres; notwithstanding that these

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[1 Vict. c. 26.]

[(*a*) But in wills under the recent act, the rule is reversed; for by s. 28, "where any real estate shall be devised to any person without any words of limitation, such "devise shall be construed to pass the fee simple, or "the whole estate or interest which the testator had "power to dispose of by will in such real estate, unless a "contrary intention shall appear by the will."]

expressions may appear to indicate rather the Land itself than the interest in it. (288.) So the word Part or Share, as denoting the Testator's interest, carries the Fee. (289.) Yet the words *Perpetual Advowson*, as being only descriptive of the thing devised, have been held not to imply a gift of the inheritance.

Paris v. Miller, 5 M. & S. 408.

Pocock v. Bp. of Lincoln, 3 B. & B. 27.

(290.) A devise to *A. in fee simple*, or to him ***for ever***, or to him ***and his successors***, or to him ***and his blood***, or to him ***and his***, or ***to give, sell, or do what he pleases with it***, gives him the Fee. (291.) So likewise if the gift to him be charged with any payment or burden, in consequence of which he might be a loser if the interest ceased with his life; but this can only be where the charge is not thrown entirely upon the lands devised, but affects the person of the devisee.

4 Bac. Ab. 250, 251.

Co. Litt. 9. b; and Harg. n. 2; Goodtitle v. Maddern, 4 East, 496.

(292.) And if the devise be in * trust for

* (293.) It sometimes happens that lands are devised to two or more persons, *and the heirs of the survivor*, upon trust to sell or mortgage them, &c. The words would not, independently of the trust, make the Devisees Joint-tenants in fee; for indeed they exclude one of the essential properties of Joint-tenancy, *viz.* the power of making Partition, or of otherwise severing the Jointure, in consequence of which each person's share might descend to his own heirs, instead of going to the heirs of the survivor. But it seems now to be generally agreed that, notwithstanding this defect in form, the evident intention of the testator is sufficient to give the fee simple to the Trustees jointly. For if not, the inconvenient consequence must follow, that they are tenants for their lives only, with a (38.)

purposes which require an unlimited power of alienation, the Trustee takes a fee simple. (294.) But on the other hand, expressions, which if used in a devise to a person for his own benefit would carry the fee, may perhaps be otherwise construed in the case of Trustees; the general
1 B. & C. 342. See 6 B. & C. 421. rule being, that they shall take no greater estate than is required for the purposes of the
See 1 Sand. Us. 244. &c. trust (*a*). The application of this rule is often attended with difficulty.

Doe v. Cundall, 9 East, 400. (295.) If lands be devised to *A.*, and if he die under age then to B., this gives the fee in the first place to *A.*, with an Executory Devise, in

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(48.) contingent remainder in fee to the survivor; which remainder, while it is contingent, cannot by any means be
(33. 75.) conveyed; and though a fine would extinguish it, that, it seems, would be for the benefit of the Testator's heir at law,
[See (82, 83.)] if he refused to concur in the Assurance; though it is evident that no such advantage was intended him. See Fearne, C. R. 357. Butl. Co. Litt. 191. a. n. 1.

[1 Vict. c. 26.] [(*a*) But under the recent act, (by s. 30,) a devise to a trustee or executor, (except of a presentation to a church,) shall pass the fee simple, or the whole estate of the testator, ' unless a definite term of years, absolute or determina- " able, or an estate of freehold, shall thereby be given to " him, *expressly or by implication*." And, by s. 31, where the devise is to a Trustee, without express limitation of the estate to be taken by him, and the beneficial interest is not given to any person for life, or if so given, the trusts may continue beyond the life of such person, such devise shall vest in the Trustee the fee simple, or the whole legal estate of the Testator, and not an estate determinable when the purposes of the trust shall be satisfied.]

the event specified, to *B*. For if it were intended that *A*. should in all events take the land for his life only, there appears no reason why the gift to *B*. should be confined to that contingency. (296.) And it may here be observed that if the Devise be to *A*. *if* or *when* he shall attain his age of twenty-one years, and if he die under that age to *B*., yet the estate vests in *A*. during his minority; for the first words of condition or contingency are used only to introduce the second, and not to suspend or defer the gift.

Bromfield *v.* Crowder, 1 N. R. 313. See 2 Swanst. 442.

(297.) Words which of themselves would not be sufficient to carry the fee simple, are sometimes aided by an introductory clause, showing the Testator's intention to dispose of all his property. (298.) And where it is evidently intended that each of several persons should take the same degree of interest, and directions are given concerning one of them, which presuppose that he takes the fee, the implication extends to them all. (299.) On the other hand, words indicative of the fee, such as "all my "Estate," may be satisfied without conferring the inheritance on the object of an indefinite devise, if they can be referred to another devise which is expressly in fee simple, though it be a nugatory one to the Testator's own heirs. (300.) And indeed it is seldom safe to rely on any particular expression, without considering the whole import of the Will.

Cowp. 660. See 4 Bac. Ab. 255; 6 T. R. 612; 3 B. & B. 41. But see also 14 East, 372.

See Right *v.* Sidebotham, Doug. 730; Doe *v.* Frost, 1 B. & C. 638.

[286.]

4 B. & C. 623. 624.

[But see 284, n.]

[But see 336, n.]

SECT. 5.—*Of Descent, Curtesy, and Dower.*

(60. 14.) (36.) (301.) IF a person die seised in fee simple, otherwise than as Joint-tenant, of Lands or Tenements, which he has not disposed of by Will, they will descend to his Heir (*a*).

(302.) The Seisin here meant is either actual,
o. Lit. 15 which supposes entry into Land, or something

[(*a*) This is no longer true as a general proposition. The late act, 3 & 4 W. 4, c. 106, has substituted a new rule of descents, which is concisely enunciated in s. 2, as follows: "That in every case descent shall be traced from *the purchaser.*" And it then goes on to enact, "That to the intent that the Pedigree may never be carried further back "than the circumstances of the case and the nature of the "title shall require, *the Person last entitled to the land* * "shall, for the purposes of this act, be considered to have "been the *purchaser* thereof, unless it shall be proved that "he inherited the same, in which case the person from "whom he inherited the same shall be considered to have "been the *purchaser* unless it shall be proved that he inherited the same; and in like manner, the last person from "whom the land shall be proved to have been inherited, "shall in every case be considered to have been the *purchaser*, "unless it shall be proved that he inherited the same."

The act having thus laid down the rule for ascertaining the *source from which* the descent is to be traced, afterwards proceeds to make important alterations in the *course through which* it is to be traced. These will be noticed below.]

[* By s. 1, the word "land" extends to all estates, possibilities, rights, titles, and interests in land, whether in possession, reversion, remainder, or contingency: and the expression, "the person last "entitled to land," extends to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof.]

analogous to such entry with respect to incorporeal Tenements; or it is virtual, which consists in the actual possession of the Tenement by another person entitled to a chattel interest therein, connected in privity or consistent in title with the estate in fee simple of the person thus virtually seised, no freehold estate being interposed. (303.) Where a person dies *actually* seised, his heir, before entry, is said to have a *seisin in law*, which qualifies him to defend his right in an action, or to receive a Release of the adverse claimant's right, but does not enable him, without a *seisin* * *in deed*, to transmit the estate by descent to his own heir as such (*a*). This point is of importance, because, though in lineal descents the same person is always heir to the father and to the son, it often happens in our Law that the collateral heir of *A.* is not heir to the ancestor or person from whom *A.* inherited.

Co. Litt. 11. b. 15. b. (33.)

(53.)

Litt. 448. 681. (22. 46.)

(304.) If a person have *purchased* (*i. e.* acquired by conveyance or devise) Lands or Tene- Co. Litt. 3. b.

* (303. *n.*) This seisin is to be acquired by the actual entry of the heir, if he be adult; but if an infant, the entry of his Guardian, or, it seems, of any other person on his behalf, will suffice, *Doe* v. *Keen*, 7 T. R. 386.

[(*a*) But this seisin in deed, either actual or virtual, is now no longer necessary in order to enable a person to transmit the estate by descent. It is enough if he were *entitled to the land*, in the sense in which that phrase is used in the act. (s. 2.) See the last note.]

Co. Litt. 11. b. 14. b. ments in fee simple, of which, from the nature of his estate, he cannot obtain seisin, these, on his intestacy, will also descend to his heir. Of such a nature is a remainder expectant upon a particular estate of freehold: and this remainder vesting in the heir by descent, will not, if it remain unaltered, descend to his heir as such, but still to the heir of the first purchaser (*a*).

See Fearne, C. R. 364. (305.) A Vested Remainder is created and purchased at the same instant, and the same may be said of a Contingent Remainder, Springing or Shifting Use, and Estate by Executory Devise, if the person to whom the interest is given be ascertained at the time of the conveyance made, or of the Testator's death; for if not, it cannot be said to be purchased until some person exists, and is ascertained, in
(28.) whom it may vest. (306.) A reversion, on the contrary, is not purchased at all, unless it be aliened after its creation; and where there has been no such alienation, the rule as to a Reversion expectant upon a Particular Estate of
Doe v. Hutton, 3 B. & P. 643. Freehold is, That it descends to the heir* of

* (306. *n.*) Some expressions have been attributed to Lord Kenyon, (8 T. R. 213,) which imply that the receipt of rent from a Tenant for life by the Heir in Reversion is equivalent to seisin of the land; but this opinion is contrary to received authorities, (Co. Litt. 32. a; and see Harg. Co. Litt. 15, a. n. 5,) and to the language of the same Judge on another occasion, 7 T. R. 390.

[(*a*) And the descent will still be in the same way under the late act. See above, 301, n. (*a*) & (*a*)*.]

the person who created it; and this, although it were created by Will, in which case the Testator, from whom it descends, himself never held it (*a*). (307.) And the same rule holds where a person having a remainder or reversion by descent, makes a lease of it for life, and thus creates a new reversion; for this will descend to his own heir. Co. Litt. 15. a. 191. b.

(308.) The eldest or only * legitimate son is Co. Litt. 14. a.

* (309.) By "legitimate" is to be understood, *ex justis nuptiis procreatus*, (Co. Litt. 7. b.) begotten, or born, (1 Ro. Ab. 358; or 4 Vin. 216,) in lawful wedlock. (310.) Foreign Marriages are recognised by the Law of England, (*Ilderton* v. *Ilderton*, 2 H. Bl. 145;) but children born before marriage, though by the laws of the country in which they are born the subequent marriage of their parents may legitimise them, are not capable of inheriting Real Property here. *Doe* v. *Vardill*, 5 B. & C. 438. (311.) But such a *Special Bastardy*, even of persons born in England, is regarded with some indulgence; insomuch that if the elder brother born before marriage, be suffered to take possession of the land on his father's death, [But see Birtwhistle *v.* Vardill, 9 Bligh, N. S. 32.]

[(*a*) The reversion being the remnant of the old estate remaining in the Grantor or Devisor undisposed of, will, it is conceived, descend to the heir of *the purchaser* of the old estate, according to the canon laid down in s. 2, and not to the heir of the Grantor or Devisor as such. But in cases of conveyance or devise, after the 31st day of December, 1833, to the Grantor, or to the heirs of the Grantor, or of the Devisor, the rule will be different; as it is now enacted that such Grantor, or the heir of such Devisor, shall be considered to take as purchaser, or devisee, and not as of his old estate or by descent. See s. 3, (below, 334, n.; 336, n.)]

in all cases the heir by the common law.
Litt. 285. (313.) By the Custom of Gavelkind, which prevails in Kent, all the sons are heirs equally.
Litt. 165. (314.) By the Custom of Borough English, the youngest son is heir.

Co. Litt. 10. b. (315.) In all cases where a person is dead who if living would inherit, his lineal heir (if any) represents him and is heir in his place.

(316.) If there be no son, nor issue of a son,
Litt. 241. all the daughters take the inheritance as copar-
(255. *n*.) ceners, and are said to make but one heir.
(36. 38.) (317.) Coparcenary is intermediate in its nature between Joint-tenancy and Tenancy in Common. There is a unity of Title, but no benefit
Co. Litt. 164. of survivorship; for the share of a Coparcener dying seised descends to her heir, who holds it
Co. Litt. 200. b. also as Coparcener. A Joint-tenant cannot convey his share to his companion by Feoffment, because each is supposed to be equally seised of the whole; but he may convey it by
(50.) Release. Tenants in Common, on the contrary, may convey to one another by Feoffment, but not by mere Release. But Coparceners may adopt either mode. (318.) And as this kind of companionship in estate is created by the Com-

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and after retaining it all his life to transmit the inheritance to his own son, the title of his younger legitimate brother is defeated. Litt. 399, 400; and see 1 Atk. 10. (312.) The illegitimacy of a married woman's child can in general be inferred only from the impossibility of the husband's access. Harg. Co. Litt. 123. b. n. 2. 126. a. n. 2; and see *Head* v. *Head*, 1 Turn. 138.

mon Law without any contract of the parties, the same Law provides for its dissolution. For either one or more of the Coparceners may compel the rest, by a Writ* *de partitione facienda*, to make partition, or, if they all agree, they may do so voluntarily; and the mutual allotment of their shares in severalty will be valid and binding without any conveyance; though perhaps, by the Statute of Frauds, a writing may now be requisite. (319.) To these partitions the Law has also annexed the incidents of an implied Warranty and Condition: a Warranty, by which, if a Real Action be brought against one of the Coparceners by a stranger who claims the land allotted to her, she is enabled to *vouch* or call upon the rest to join in defending her right, or, if she shall be evicted, to contribute from their own allotments to her compensation; and a Condition, by virtue of which, if lawfully evicted, she may enter on the other allotments, and thus annulling the Partition, be restored to her old undivided share in the remaining Tenements. If, however, one of the Coparceners after partition alien her allotment, the Feoffee or Grantee cannot take advantage of this implied Warranty or Condition, though it may be enforced against him by the other Coparceners. (320.) If, without partition, a Coparcener alien her undivided share,

Litt. 243. 247. &c.

Harg. Co. Litt. 169. a. n. 3, 4. (167.)

Co. Litt. 173. b. 174. a. (64.)

Co. Litt. 172. b; Litt. 262.

Co. Litt. 175. a.

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* (318. *n.*) This writ, by St. 31 H. 8, c. 1, and St. 32 H. 8, c. 32, is also made applicable to the cases of Joint-tenants and Tenants in Common.

the Feoffee or Grantee is Tenant in Common with the rest.

Litt. 3. (321.) If a person die without issue surviving him; he has no lineal heir; for the inheritance cannot ascend to either parent(*a*); and therefore the collateral heir succeeds.

(304.) Litt. 4. 6. (322.) The Collateral heir of a Purchaser is the same with the lineal heir of his Father, if there be no impediment of half-blood (*b*). But if

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[(*a*) But the law is now altered in this respect, for by s. 6 of the late act it is enacted, "That every lineal Ancestor shall be capable of being heir to any of his issue; "and in every case where there shall be no issue of *the* "*Purchaser*, his nearest lineal ancester shall be his heir, in "preference to any person who would have been entitled "to inherit, either by tracing his descent through such lineal Ancestor, or in consequence of there being no descendant of such lineal Ancestor; so that the father shall "be preferred to a brother or sister, and a more remote "lineal Ancestor to any of his issue other than a nearer lineal Ancestor or his issue."

3 & 4 W. 4. c. 106.

And it is declared, that no maternal Ancestor or her descendants shall inherit until all the paternal Ancestors and their descendants shall have failed; nor any female paternal Ancestor or her descendants, until all the male paternal Ancestors and their descendants shall have failed; nor any female maternal Ancestor or her deseendants, until all the male maternal Ancestors and their descendants shall have failed. (s. 7.)

And also that the mother of the more remote male paternal, or male maternal Ancestor, shall be preferred before the mother of the less remote male paternal, or male maternal Ancestor. (s. 8.)]

[(*b*) The half-blood is now permitted to inherit, and its place is declared to be "next after any relation in the same "degree of the whole blood and his issue, where the common Ancestor shall be a male, and next after the com-

the Father has married any other woman besides the mother of the Purchaser, his issue by such other woman (whether elder or younger) are out of the question. For the consanguinity which is necessary in our Law to constitute collateral heirship in Fee Simple, consists in being descended, not merely from the same single progenitor, but from the same pair (*c*).

(323). If there be no Brother or Sister of the whole blood, nor issue of such Brother or Sister, the collateral heir is the person who, rejecting the half-blood, would be lineal heir of the Father's Father. And so on in the male line (*c*).

(324.) If no heir can be found in the male line, the lineal heir, (rejecting the half-blood as before,) of the Father's Mother is to be preferred to that of the Mother of the Purchaser (*c*). But whether the like heir of the Father's Father's Mother has not a still preferable claim has been much disputed. Analogy is evidently in his favour; nor does there appear to be any serious inconvenience in following that analogy to the utmost (*d*).

Co. Litt. 12. b.

2 Black. Comm. 338.

(325.) If it should happen that the heir is to

Co. Litt. 12 b.

"mon Ancestor where such common Ancestor shall be a "female; so that the brother of the half-blood, on the part "of the father, shall inherit next after the sisters of the "whole blood on the part of the father and their issue, and "the brother of the half-blood on the part of the mother, "shall inherit next after the mother." (s. 9.)

[(*c*) But see now, 321 n. 322 n. (*b*).]

[(*d*) This analogy, it will be perceived, has been followed by the legislature. See s. 8, above, 321, n.]

be sought in the maternal line, the same rules are to be observed, beginning with the issue of the Mother's Father (*a*).

Litt. 4.

(326.) The Collateral heir of a person dying seised, who was not the first purchaser, but himself entitled by descent, is to be sought in that line only in which the Tenement actually descended(*b*). And thus the heir on the Mother's side may be entitled, not only in preference to, but in absolute exclusion of, all the paternal relations as such. (327). But instances have occurred, where the Father, having married his Cousin, has inherited, as collateral heir to his own son, the tenements which descended to that son from his Mother.

Eastwood v. Vinke, 2 P. Wms. 614.

(309, 310. 312.) 2 P. Wms. 78. (189.) Co. Litt. 8. a.

(328.) A Bastard cannot inherit, nor can he have any but lineal heirs. (329.) A person attainted of Treason or Murder cannot inherit nor have heirs; and yet, if but for his attainder he would be heir, he then interrupts the descent (*c*), and there is no heir. The consequence

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[(*a*) But see now above, 321, n.]

[(*b*) And now the tenement is effectually preserved in the line in which it has descended, by means of the provisions of s. 2; above 301, n.]

[(*c*) This is now altered, so far as the *interruption* of descent is concerned; for, by s. 10, when the person from whom the descent is to be traced, shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, such attainder shall not prevent any person from inheriting, who would have been capable of inheriting by tracing his descent through such relation; unless the land shall have escheated before the 1st of January, 1834.]

is, that the Land goes to the Lord by Escheat. Other Felonies, committed since the St. 54 G. 3, c. 145, do not prejudice the right of any person, except that of the Offender during his own life. And indeed by the Custom of Gavelkind no Felony has that effect, unless, in consequence of the criminal's escape, it be followed by Outlawry. (330.) An Alien, by the Common Law, could neither receive, transmit, nor interrupt the inheritance; every thing proceeded as if he had never existed: except that, if he had children born in this country, they might inherit each others purchases. (331.) And now, by Statute 11 and 12 W. 3, c. 6, a natural born subject may derive his title of inheritance through alien Parents or Ancestors: but to prevent claims of this kind from starting up at a distant period, the St. 25 G. 2, c. 39, provides that the person who claims, by virtue of the former Statute, must be in existence at the death of him to whom he makes himself heir; but so that, if the existing claimant be a female, and have afterwards a Brother or Sister born, the whole estate, or a share in coparcenary, will then devolve to the latter*.

3 Bac. Ab. 361.

(193.) Collingwood v. Pace, 1 Ventr. 413.

* (332.) There are cases at Common Law where the inheritance once vested will be divested in favour of the right heir afterwards born. Thus a posthumous son will inherit his Father's estate to the exclusion of his Sisters, as a posthumous daughter would share with them. So if a Brother purchase lands, which upon his dying without issue descend to his Sisters, they can never be secure

Co. Litt. 12. b. (333.) If *A.*, being seised of Lands by descent from his Mother, convey them to *B.* in fee, that he may re-convey them to *A.* in fee, which is accordingly done, this makes *A.* a purchaser; so that if he die without issue, his heir on the Father's side will inherit. Co. Litt. 13. a. (334.) But if there had only been a conveyance to *B.* in fee, to the use of *A.* in fee, *A.* would then be *in of his old use,* and the lands would descend to his maternal heir (*a*).

(335.) The Common Law, tenacious of its own dominion over property, never construed that as a Purchase which it was possible to consider as a Descent, or a continuance of the old ownership. Co. Litt. 22. b. Thus, if a person made a Feoffment to *A.* for life or in tail, with remainder expressly to himself in fee, this Remainder was void, and the property continued in him by way of Reversion. The same rule holds if the Conveyance be to uses; as if *A.* convey his land to *B.* in fee, to the use of *C.* for life, or in tail, with re-

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while both parents are alive, for so long there is a possibility that a Brother of the whole blood may be born. Co. Litt. 11. b.

[3 & 4 W. 4. c. 106.] [(*a*) But now, by s. 3 of the late act, where any land shall, *after the 31st of December,* 1833, have been limited by any assurance, (except a will,) to the person or to the heirs of the person who shall thereby have conveyed the land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.]

mainder to the use of *A.* in fee, here *A.* has the reversion of his old Use (*b*).

(336.) So, if there be a Devise in fee simple (whether immediate or in remainder) to the person who is the Testator's own heir, the Devise is void, and the heir takes by descent (*c*) 4 Bac. Ab. 315.

(337.) Where however the inheritance would go to Coparceners, a Devise to them in fee as Tenants in Common is good, because this from the beginning alters the quality (though not the quantity) of their estate. So, if the whole be devised to one of them, she takes it entirely by virtue of the Will, and no part by descent; for here is no devise to the heir, because one of them is not heir without the other. 4 Bac. Ab. 316. (317.) Reading *v.* Royston, 1 Salk. 241. (316.)

(338.) But a Devise to the heir in fee, subject to an executory Devise, on a future contingency, to a stranger, gives no new estate to the heir; it only threatens to defeat the estate which has descended to him (*c*). 4 Bac. Ab. 315. Fearne, C. R. 28.

(339.) The most remarkable rule relating to this subject is that called *The Rule in Shelley's Case;* which (for our present purpose at least) may be thus stated: That wherever an estate of freehold is given, and, by the same conveyance or will, an ulterior estate, (whether immediately

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[(*b*) See the last note.]

[(*c*) But now, by the same third section, when land shall have been devised by any Testator *dying after the* 31*st of December*, 1833, to the heir or to the person who shall be the heir of such Testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.]

following the first or subject to other remainders intervening,) *to the heirs* of the same person, this ulterior estate vests in that person himself, in the same manner as if it had been expressly given *to him* and his heirs. Hence it is said that in such case the word "heirs" is a word not of *purchase* but of *limitation, i. e.* of description of estate; the word of purchase, or description of the person who is to take the estate, being suppressed and understood. (340.) But if the estate of freehold had been given not to *A.* but to another person, as *B.*, the remainder to the heirs of *A.* would have been contingent, (for no one has an heir while he lives,) and would vest by purchase, (if it vested at all,) in the person who was heir of *A.* at his death (*a*). (341). It follows from this rule, that if Lands or Tenements be given to *A.* for his life, with remainder after his decease to his heirs, *A.* may dispose of them at his pleasure; but his whole interest lies in Livery, and not in Grant. For his estate for life merges in his immediate remainder in fee, and he is to all purposes actual tenant in fee simple.

Co. Litt. 8. b. 22. b, Fearne, C. R. 9.

(40.)

Fearne, C. R. 41, &c

(342.) The application of the rule is some-

[3 & 4 W. 4, c. 106.]

[(*a*) But by s. 4 of the late act, when any person shall have acquired land *by purchase*, under a limitation to the heirs or heirs of the body of *A.*, in a deed executed *after the* 31*st of December*, 1833, or under a limitation of like effect in a will where the Testator died after that day, the land shall descend as if *A.* had been the purchaser.]

times aided by the doctrine of Resulting Uses. Thus, if on any conveyance the first limitation of the Use be to the *heirs of the body* of the Grantor, (words indicative of an estate tail, and therefore not nugatory like the gift of the fee simple to his own heirs,) the Use resulting to him for his life unites with this limitation, and makes him immediate Tenant in Tail. (343.) If the limitation to the heirs of the Grantor's body be preceded by an estate to any other person for a term of years, however long, for his life, or even in tail, there will still be a resulting Use to the Grantor in remainder for his life, and thus he will become, upon the whole matter, Tenant in Tail in Remainder. (344.) There are two cases, however, in which this resulting Use is excluded; as, first, where the Use is declared to another person for the life of the Grantor; (345.) and, secondly, where it is declared to the Grantor himself for a term of years, which is thought inconsistent with his taking by implication the freehold also.

[But see 333, n.]

(168.)

(346.) Whether a Springing Use or Executory Devise to the heirs of a person who takes an estate of freehold by the same instrument will commence in that person himself, has been doubted. But if there be nothing peculiar in the case to make "heirs" a word of purchase, the general rule seems applicable. And it has even been contended, with much cogency of argument, that where the limitation to the heirs is effected by an Appointment, in exercise of a

Fearne, C. R. 276.

Fearne, C. R. 74.

(172, 173.)

Power created by the Deed or Will which gave the life estate, both instruments are for this purpose to be considered as one.

(347.) The principle of the rule has been carried so far, that where land is given to two persons for their lives, with remainder to the heirs of him *who shall die first,* the heir is held to take by descent; and yet during the life of his ancestor the estate was not only contingent, but the person, whose heir should take it, unascertained.

Co. Lit. 378. b.

(348.) Descent from a person seised in fee does not always confer the immediate enjoyment of the estate; it may be subject to the claims of a husband or wife of the deceased.

Lit. 35. 52.

The husband is entitled to hold for his life, as Tenant by the Curtesy of England, all the Lands and Tenements of which he and his wife were seised *in deed* (actually or virtually) in her right, for an estate of inheritance; provided that he has had by her a child born alive, who either does or might inherit the same.

(302, 303.) Where seisin in deed of incorporeal tenements is not necessary, see Co. Litt. 13.b; 29. a.

Litt. 36. 53.

(349.) The Wife is entitled to receive by the Assignment (being a designation by metes and bounds where that is possible) of the heir, and to hold for her life as tenant in Dower, one third part in value of all the Lands and Tenements (with some few exceptions) of which her husband was seised in deed or in law, at any time since the marriage for an estate of inheritance which a child born between them (if

Co. Litt. 31. b. 32. a.

Co. Litt. 31. a.

any) might possibly inherit (*a*). By the Custom of Gavelkind she is entitled to a Moiety, but only during her widowhood. Co. Litt. 33. b.

(350.) The husband, from the moment of the child's birth, or of the acquisition of the property by the wife, (whichever last happens,) is enabled to convey, by Feoffment, an estate for his own life to another person. Before the birth of a child, he can convey a good estate for the joint lives only of himself and his wife. Co. Lit 30. a.; Anon. 5 Bac. Ab. 852.

(351.) The wife's right commences with the marriage, or the subsequent acquisition of property by the husband; and it is not defeated Co. Litt. 32. a.

[(*a*) The law respecting dower has been materially altered by the late act, 3 & 4 Wm. 4, c. 105. Its provisions which are applicable only to the case of widows whose marriages *took place since the first of January*, 1834.) are principally prejudicial to the widow's interests, and seem to have been framed with the view, principally, of affording facilities for freeing lands from a claim which was often found to act as a clog on alienation. The 2nd and 3rd sections, however, are in favour of the widow, the 2nd section entitling her in Equity to dower out of lands which her husband shall die beneficially entitled to, for an interest which would not entitle her to dower at Law; such interest, whether wholly equitable or partly legal and partly equitable, being an estate of inheritance in possession, and equal to an estate of inheritance in possession; (other than an estate in joint-tenancy;) and the 3rd section entitling her to dower out of lands in which her husband had a right of entry or action, although he shall not have recovered possession thereof; provided such dower be sued for or obtained within the period during which such right might be enforced]

by his alienation, for she may compel the purchaser, after her husband's death, to assign her dower (*b*). But she may extinguish her right

Cru. Fi. 204: Cru. Rec. 270.

[3 & 4 W. 4, c. 105.]

[(*b*) But now, the widow, if within the provisions of the late act, *i. e.* if married since the first of January, 1834, is not entitled to dower out of any lands absolutely disposed of by her husband in his lifetime, or by his will. (s. 4.) And all partial estates and interests, and all charges created by the husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject, shall be valid and effectual against her right to dower. (s. 5.)

And she shall not be entitled to Dower, when in the deed by which the land was conveyed to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to Dower out of such land. (s. 6.) And her right to dower may also be barred by a declaration of his intention to that effect in his will duly executed for the devise of freehold estate; (s. 7;) and it shall be subject to such conditions and restrictions as shall be declared by his will so executed. (s. 8.)

And where her husband shall devise any lands, out of which she would otherwise be dowable, or any estate or interest therein, to her or for her benefit; she shall not be entitled to dower out of *any* land of her husband, unless a contrary intention be declared by his will. (s. 9.) But no gift or bequest out of his personal estate or out of his land not liable to dower, shall prejudice her right to dower, unless a contrary intention be declared by his will. (s. 10.)

But the husband may bind himself by covenant or agreement (enforceable in equity) not to bar the right of his widow to dower out of his lands, or any of them; (s. 11;) and legacies bequeathed to widows in satisfaction of dower, shall be entitled to the same priority * over legacies as heretofore. (s. 12.)]

[* See on this point, *Blower* v. *Morret*, 2 Ves. 420; *Heath* v. *Dendy*, 1 Russ. 543.]

by joining with her husband in levying a Fine, or suffering a Recovery (*a*). (352.) When she has received her Dower from the hands of the heir, she is considered as deriving her estate immediately from her husband, so that only a reversion in that part of the property has in effect descended to the heir. Co. Litt. 31. a.

(353.) No right of Curtesy or Dower attaches upon an estate held in Joint-tenancy; for the right of survivorship is preferred to all charges and incumbrances which do not amount to at least a partial alienation of the share. Nor if the husband, being a Joint-tenant, convey his share to another, and thus at once de- Co. Litt. 185. a. Co. Lit. 31. b.

[(*a*) In the case of a wife married since the 1st of January, 1834, her husband is enabled to extinguish her right to dower without her concurrence. (See last note.) In the case of a wife married before that day, and to whom, therefore, the Dower Act does not extend, it will be remembered that fines and recoveries have been abolished, by St. 3 & 4 W. 4, c. 74; (66 n. (*a*);) but that certain modes of assurance have been substituted by that statute by which married women may convey or extinguish their estates or interests in land. (66, 2 n. (*a*).) It has been doubted whether such a wife could with her husband, extinguish her right to dower under the provisions referred to.

It seems impossible to suppose that the case was not in the contemplation of the legislature; this being the principal case in which a married woman formerly had occasion to levy a fine; and the words of the act were sufficiently extensive to include it. The general opinion, it is believed, is in favour of the power of extinguishment. (See Sugd. V. & P. vol. 2, p. 308.)]

stroy the right of survivorship, and deprive himself of the property, will his wife be entitled to Dower.

Co. Litt. 29. a. 32. a.

(354.) No right of Curtesy or Dower attaches upon a Remainder or Reversion expectant upon a particular estate of freehold. And even if *A.* be tenant for life, with a vested remainder to *B.* for his life, with remainder to *A.* in fee, and *A.* die before *B.* the husband or wife of *A.* will not have Curtesy or Dower, because *A.* was never seised of the Freehold and Inheritance as one estate.

2 Bac. Ab. 364; Fearne, C. R. 346.

(23.) Co. Litt. 202. a; 1 Ro. Ab. 474; or 5 Vin. 315.

(355.) By the Common Law, Entry for a Condition broken defeats the conditional estate, and all interest derived out of it; it therefore defeats the Right of Curtesy and Dower, (356). But where the wife or husband has an estate in fee, subject to be divested by a Shifting Use, or Executory Devise, it has been a disputed question, whether these rights may not be enforced after the event, and notwithstanding the divesting and destruction of the estate upon which they attached. This point has been decided in the case of *Buckworth* v. *Thirkell* in favour of Curtesy; and recently, in that of *Moody* v. *King*, in favour of Dower. The executory devise did not take effect till the death of the wife in the first of those cases, and of the husband in the second (*a*). But in the case

Butl. Co. Litt. 241. a. n. 4; 3 B. & P. 652. n.; 2 Bing. 447.

[(*a*) But where the executory devise was to take effect on the death of the wife leaving issue, and the limitation

of *Ray* v. *Pung*, where the husband had a general Power to appoint the uses of the land, and, subject to that power was seised in fee, it was held, that by appointing to a purchaser in fee, he defeated his wife's right of dower. The estate in this case was divested in the lifetime of the husband, and the appointee took not the husband's estate but a new fee simple. In the two former cases there was also a new fee simple, but subject to Dower or Curtesy, as an excrescence out of or continuance of the old fee, which would be still subsisting if its former owner were alive. Such, and so subtle, appears to be the distinction, on the ground of positive law, between these decisions; and when we consider that in one of them the husband was allowed by his own act to defeat the incumbrance which he had voluntarily contracted, and that the claim of Dower according to the old maxims of law, is entitled to peculiar favour, there seems to be some need of a rational ground for the distinction; which perhaps may be found in an inclination of the Courts, in the present age, to support all contrivances by which a person who has invested money in the purchase of land may be enabled at a future time to resell it without the expense of a conveyance by Fine.

5 B. & A. 561. See 10 V. J. 266.

Bac. Tr. 331.

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over was to such issue and their heirs, the husband was held not to be entitled to Curtesy; for the issue must have taken as *purchasers*, and could not by possibility *inherit*. *Barker* v. *Barker*, 2 Sim. 249.]

(357.) Before the Statute of Uses, the Use or Equitable Estate was subject neither to Curtesy nor to Dower (*a*). Hence Settlements upon marriage became necessary; of which the most simple form was to make the husband and wife Joint-tenants, that the whole might go to the survivor. This seems to be the origin of

2 Black. Comm. 137. the word *Jointure*, as applicable to the provision made for a woman upon marriage in the event of her husband's death; though it has been more usual, as being more secure, to make this provision by way of remainder, expectant upon a life estate in the husband. The Statute of Uses would have given an unfair advantage to many of the married women of that day, by vesting legal estates in their husbands out of which they might have claimed Dower, in addition to their Jointures, if it had not provided for such cases in its sixth and three

Co. Litt. 36. b. following sections. (358.) The effect of these clauses (which have a prospective and perpetual operation) is, that if before marriage lands or tenements be conveyed by the husband, or by his procurement, in such manner as to give the wife a legal estate for her life at least, to be enjoyed immediately after her husband's death, she is barred of all claim to Dower out

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[1363.] [(*a*) And so, after the Statute, Equitable and Trust Estates were not, till the late act, 3 & 4 Wm. 4, c. 105, s. 2, (above, 349, n. (*a*),) liable to Dower; though the husband, it has been decided, is entitled to Curtesy out of such Estates.]

of the remaining tenements of her husband. (359.) But this is on condition that she be not afterwards evicted, or lawfully ousted of her Jointure. (360.) It is not necessary, however, that the wife should be of full age at the time of her marriage. (361.) And though, if such a provision be made for her by her husband's Will, or otherwise after her marriage, expressly in bar of, or as a substitute for her Dower, she is not bound, after his death, to accept it; yet if she do, she is barred.

Harg. Co. Litt. 36 b. n. 7

(362.) The right of Dower may also be barred by the husband's Fine, and five years non-claim by the wife after his death.

Anne Twist's Case, Shep. Touch 28.

[See now 66, n. (a), 349, n.]

Sect. 6.—*Of Rights of Entry and Action.*

(363.) If a person be disseised, or otherwise unlawfully deprived of his land, he may enter when he sees his opportunity, and so restore or commence his own seisin. (364.) So if his reversion or remainder in any land be illegally divested, he may nevertheless enter when the time for his possession has arrived; and if the act of divestment amount to a forfeiture of the only preceding particular estate, he may enter immediately. (365.) But in all these cases, until such entry, or until the remainder or reversion is revested by the entry of the person entitled to the particular estate, the person injured has no estate which he can convey or

Litt 414.

Co Litt 251.b. 252. a. (72.)

Co. Litt. 9. a. 49, a.

devise (*a*); he has only a ***Right,*** which will descend as the Land, if vested in him by a mere
(303.) seisin in law (*b*), would have descended; unless
(46.) he ***release*** it to the person in actual seisin, or to one in whom a reversion or remainder of freehold is for the time vested. (366.) But it
(242.) may be observed, that in case of Bankruptcy,
Smith v. Coffin, 2 H. Bl. 444. the Power given by Statute to the Commissioners enables them to transfer Rights, as well as Estates to the Assignees (*c*).

(367.) This Right of Entry will be lost, if
Litt. 385. 414. the wrong-doer be suffered to keep possession of the Land without sufficient interruption till his death, and then transmit it by immediate
(348.) descent (without Curtesy or Dower interposed,) to his heir (*d*); provided that the person who has
Litt. 393, 394. 389, 402, &c. right do not labour under some disability at the time of this descent, from which he has never
Litt. 422, 423. been free since his right accrued. (368.) A claim or protestation, solemnly made upon or near the land, in the presence of witnesses, within

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[(*a*) Rights of entry are now devisable by will. See 1 Vict. c. 26, s. 3; above 259, n.]

[(*b*) The right of entry will now descend in the same manner as the land itself, if recovered, would have done. See 3 & 4 Wm. 4, c. 106, ss. 1, 2; (above, 301, n. and n*.)]

[(*c*) Such rights, therefore, now vest in the assignees by virtue of their appointment. See 1 & 2 W. 4, c. 56, s. 26; (above, 242, n. (*b*).)]

[(*d*) The right of entry cannot now be so lost. By 3 & 4 W. 4, c. 27, s. 39, no *descent cast*, discontinuance, or warranty shall defeat any right of entry or action for the recovery of land.]

the year immediately preceding the descent, is sufficient to avoid its effect (*a*). (369.) And by St. 32 H. 8, c. 33, where the wrongful acquisition is by Disseisin properly so called, (in opposition to Abatement and Intrusion, which are usurpations of a vacant possession, the former before the entry of an heir, the latter before that of a Reversioner or Remainderman,) it must be immediately followed by five years of peaceful possession without any such claim, or a subsequent descent will not take away the right of entry (*b*). Co.Litt. 238.a.

(370.) Moreover by St. 21 Jac. 1, c. 16 (*c*), "for quieting of men's estates, and avoiding of

[(*a*) And, by s. 11, no continual or other claim upon or near any land shall preserve any right of entry or distress or of action.]

[(*b*) See above, 367, n.]

[(*c*) The late Statute, 3 & 4 W. 4, c. 27, enacts, (s. 2,) "That no person shall make an entry or distress, or bring "an action to recover any land or rent but within *twenty* "years next after the time at which the right to make such "entry or distress or to bring such action shall have first "accrued to some *person through whom he claims; or if "such right shall not have accrued to any person through "whom he claims, then within twenty years next after the

[* "The person through whom another person is said to "claim shall mean any person by, through, or under, or by the "act of whom, the person so claiming became entitled to the "estate or interest claimed, as heir, issue in tail, tenant by the "Curtesy of England, tenant in Dower, successor, special or "general occupant, executor, administrator, legatee, husband, "assignee, appointee, devisee, or otherwise, and also any person "who was entitled to an estate or interest, to which the person so "claiming or some person through whom he claims became en-"titled as Lord by escheat." (s. 1.)]

" suits," it is enacted in s. 1, " That no person

" time at which the right to make such entry or distress " or to bring such action shall have first accrued to the per- " son making or bringing the same."

The 3rd section* declares at what time, in certain cases, such right shall be deemed to have first accrued; viz.; where the claim is in respect of an estate in possession,—on dispossession or discontinuance of the possession of the land, or from the last time of receipt of the profits of the land or of the rent: where the claim is in respect of the estate of some person deceased who died in such possession or receipt, and was the last person entitled who was in such possession or receipt,—on the death of such person: where the claim is in respect of an estate in possession conveyed by any instrument, (other than a will,) and no person entitled under such instrument has been in such possession or receipt,—at the time at which the party became entitled to such possession or receipt under such instrument: where the estate claimed is an estate in reversion or remainder, or other future estate, no person having obtained such possession or receipt in respect thereof,—at the time when the same became an estate in possession†: and when the claim is, by reason of any forfeiture or breach of condition,—at the time when such forfeiture or breach occurred.‡

By s. 7, in the case of a Tenancy at will, the right sub-

[* This section does not, it seems, include every case which may arise and which is not specifically provided for in the subsequent sections. It has, however, been decided that a case not coming within the 3rd section, is still subject to the operation of the 2nd, the 3rd being intended only to explain the 2nd, in doubtful cases, and not otherwise to control its operation. See *James* v. *Salter*, 3 Bing. N. C. 553.]

[† And that, notwithstanding, (in the case of a reversion,) the reversioner shall, previously to the creation of the estate or estates determined, have been in such possession or receipt. (s. 5.)]

[‡ Where such right by reason of forfeiture or breach of condition shall have first accrued in respect of an estate in reversion

"or persons shall make any entry into any lands, "tenements or hereditaments, but within twenty

ject thereto shall be deemed to have first accrued at the determination of such tenancy, or at the end of one year from its commencement, at which time such tenancy shall be deemed to have determined.*

[Doe d. Burgess v. Thompson, 5 A. & E. 532; Doe d. Thompson v. Thompson, 6 A. & E. 721.]

And by s. 8, in the case of a tenant from year to year, or other period, without lease in writing, the right subject thereto shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last receipt of rent in respect of the tenancy, (which shall last happen.)

And by s. 9, where a lessee is in such possession or receipt under a lease in writing at 20s. rent or upwards, and the rent shall have been received by some person wrongfully claiming the land in immediate reversion, and no payment in respect of the rent afterwards made to the person entitled thereto,—the right of the person entitled, subject to the lease, shall be deemed to have first accrued at the time at which the rent was first so wrongfully received, and not on the determination of the lease.

And by s. 14, where any acknowledgment of the title of the person entitled shall be given to him or his agent in writing signed by the person in such possession or receipt, his possession or receipt shall be deemed the possession or receipt of the person entitled; and his right shall be deemed to have first accrued at the time of giving such acknowledgment, or the last of such acknowledgments, if more than one.

And by s. 35, the receipt of rent payable by any tenant from year to year or other lessee, shall as against such lessee, (but subject to the lease,) be deemed to be the receipt of the profits of the land.

or remainder, and the land shall not have been recovered by virtue of such right, the right shall be deemed to have first accrued at the time when such estate shall have become an estate in possession. (s. 4.)]

[* But no mortgagor or *cestui que trust* is to be deemed a tenant at will, within the meaning of this clause, to his mortgagee or trustee; (and see further below, 400, 401, & n.)]

"years next after his or their Right or Title, "which shall first descend or accrue to the "same; and in default thereof, such persons so "not entering, and their heirs, shall be utterly "excluded and disabled from such entry after "to be made." (371.) But by s. 2, a person who at the time when his right of entry first accrued or descended to him, laboured under any of the (*a*) disabilities which have been already

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[(*a*) The provisions of the late act in cases of disability are in some respects more restrictive of the right than the old law as stated in the text. [3 & 4 W. 4, c. 27.]

S. 16 provides, that if at the time when the right of any person first accrued, such person was under any of the disabilities therein mentioned, namely, * "Infancy, Coverture, "Idiotcy, Lunacy, Unsoundness of Mind, or Absence be-"yond Seas" †; then such person or the person claiming through him, may notwithstanding the *twenty* years shall have expired, make an entry or bring an action at any time within *ten* years after the time when the person to whom such right first accrued as aforesaid, ceased to be under *any such* disability or died, (which shall have first happened.) But s. 17 provides, that no entry or action shall be made or brought by any person, who at the time when his right first accrued was under any of the disabilities aforesaid, or by any one claiming through him, but within *forty* years next after the time at which such right first accrued, although such person may have remained, under one or more of such disabilities, during the whole forty [Doe *v.* Bramston, 3 Ad. & El. 63.]

[* Imprisonment, it will be observed, which under the old Statutes of Fines and of Limitations, was a disability, is now no longer such.]

[† No part of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any Island adjacent to them, being part of the dominions of the King, shall be deemed to be beyond seas.]

mentioned in the Statute of Fines, is allowed ten years from the removal of such disability; and if he die under it, his heir, though not disabled, has ten years from his death. (372.) Upon which saving the same construction has been made as upon that in the Statute of Fines, that the disability, from the termination of which the period is to run, must be uninterrupted (*b*). (373.) And it has also been decided, that where there has been a continuing series of disabilities, and one or more descents of the right, the first section does not give twenty years after the last descent; but the entry must be made, either within twenty years from the commencement of the right, or within ten years from (*c*) the last disability removed. Upon the whole indeed the word

(91. 94.)

(93.)

Doe *v.* Jesson, 6 East, 80; Cotterell *v.* Dutton, 4 Tau. 826.

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years, or although the term of ten years from his ceasing to be under any such disability, or dying, shall not have expired. And s. 18 further provides, that where any person shall be under disability when his right first accrued, and shall die without having ceased to be under disability, no time to make an entry or bring an action, beyond the twenty years next after the right first accrued, or the ten years after his death, shall be allowed by reason of any disability of any other person.]

[(*b*) And so under the new act, but with the further restriction to forty years in all cases from the first accruing of the right.]

[(*c*) But see now, s. 18, above, 371, *n.* which determines, that no allowance shall be made for disabilities of *successive* claimants: a point which seems not to have been altogether free from doubt under the old Statutes, though the practice is said to have been the other way. 1 Rep. R. P. Comm. 65; 2 Sugd. V. & P. 322.]

descend in the first section of the Statute seems to be superfluous.

7 East, 311. 312. 321; but see 1 Turn. 117, [and 370, n.] (374.) The Right or Title contemplated by the Statute must be such as enables the party lawfully to enter on the Tenement; and therefore the period cannot begin to run till all prior estates, including terms of years and other chattel interests, are out of the way.

(375.) When the right of entry is lost, in some cases (which will presently be specified) there is no remedy left. But for the most part a Right of Action remains: which however must be prosecuted within the time limited by St. 32 H. 8, c. 2 (*a*).

(376.) In order to understand this Statute, it must be observed, in the first place, that in Real Actions it is necessary for the Demandant to allege and prove a *seisin* of the Tenement in

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[3 & 4 W. 4, c. 27.] [(*a*) But now the right to make an entry and the right to bring an action are placed in all respects on the same footing in regard to time. (See 370, n. 403.)

And the Act, moreover, has abolished all actions for the recovery of land, except actions on the writs of Dower, *Quare Impedit*, and Ejectment. (s. 36.) With the exception, therefore, of the two first-mentioned species of action, (the first being the appropriated remedy for the right of dower, and the second for the right of patronage of an ecclesiastical benefice*;) the action of ejectment (see 403, &c.) is now the universal remedy at law for the recovery of land.]

[1237.] [* By s. 30, no *Quare Impedit* or other action or suit to enforce a right of presentation shall be brought after three successive Incumbencies of the Benefice adverse to the right of presentation claimed: nor after *one hundred* years' possession of the Benefice adverse to such right. (s 33.) And an Incumbency on a
[1233.] lapse after an adverse Incumbency shall be deemed adverse, but
[1230] not an Incumbency on promotion. (s. 31.)]

question, either in his own person, or in that of some other from whom he deduces his claim. If he ground his action upon his own personal seisin, the Statute requires that it should have been within thirty years before the action commenced. (377.) But if he rely on the seisin of another person, the time is enlarged, with a distinction according to the nature of the action.

If the action be what is called * *Possessory* of which nature are the various kinds of *Writs of Entry* and *Assizes*, the seisin of the Demandant's "Ancestor, or Predecessor," must have been within fifty years before the commencement of the action. (378.) The word Predecessor has a technical signification in law, answering to Successor in the case of a Corporation sole, as Ancestor does to Heir in the case of a natural person; and it seems to have been rightly held that it has no other meaning in this Statute.

(130.)

Widdowson v. E. of Harrington, 1 Jac. & Walk. 532.

(379.) But there are cases where the Law has provided a remedy by Action, and yet it is impossible for the party to allege either his own or his Ancestor's seisin. Thus, if *A.* be [See 375, n.]

* (377. *n.*) The distinction which is commonly made between Actions Possessory and Actions Droitural, *viz.* that in the former the *right of possession*, in the latter the *right of property*, comes in question, seems to be derived from the *relative conclusiveness* of those actions, and not from their form or absolute effect. It is difficult, in the absolute sense of the words, to distinguish a right of *possession in fee simple* from a right of property. But the catalogue of Actions in each Class is well ascertained.

tenant for life, with remainder to *C.* in fee or with reversion to *B.* in fee, which reversion *B.* afterwards grants to *C.;* and then *A.* dies, and a stranger *D.*, intrudes into the land.

F. N. B. 204. Now, by the Common Law, *C.* may bring his

Bro. Ab. Explees, 3; 1 J. & W. 557. Writ of Intrusion against *D.*, and allege the seisin of the person who made the Settlement, and also of *A.*, the tenant for life. (380.) Similar remedies are given to the Purchaser, or

F. N. B. 206. 207. assignee, of a Reversion, and to a Remainder-man, by the Writs of Entry called "In casu proviso," and "In consimili casu," where any Tenant for life has made a wrongful alienation in fee simple, or otherwise, for a greater term than that to which he is entitled. (381.) And there is also a Writ of Dower, by which a Widow may compel the due assignment of her third part. (382.) None of these cases * are within the letter of the Statute,

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* (382. *n.*) The Statute says, (s. 2.) "that no person "shall sue, have, or maintain any Assize of Mort-ancestor, "Cosinage, Ayel, Writ of Entry *upon Disseisin done to any* "*of his Ancestors or Predecessors,* or any other Action Pos-"sessory, *upon the possession of any of his Ancestors or* "*Predecessors,* for any manors, lands, tenements, or other "hereditaments, of any further seisin or possession of his "Ancestor or Predecessor, but only of the seisin or pos-"session of his Ancestor or Predecessor which was seised "of the same manors, &c. within fifty years next before "the Teste of the Original of the same Writ hereafter to "be brought." And the 6th section, which bars the Demandant for ever if the seisin which he had alleged be denied, and he be unable to prove it, begins with the

though it may rightly be extended to them by an equitable exposition. But in all of them, except the Writ of Dower, a question must arise who that person is, from the last moment of whose seisin the fifty years are to be computed—the Donor, or the Tenant for life? Neither of them bears so much analogy to an Ancestor of the Demandant, that the Statute can be made applicable by mere similitude of relation; but if the Donor be the person, then this inconvenience must follow, that it may depend on a mere accident (the length of the first Donee's life), whether any and what time is allowed for prosecuting the claim; and therefore it may be thought most reasonable to fix the commencement of the period at the later of the two points, hoewver this may diminish the efficacy which might otherwise be attributed to the Statute. This seems to have been the opi- 6 Tau. 275.
nion of Sir V. Gibbs, and of the Court of Common Pleas, where he presided; though the contrary doctrine has been more recently delivered by the late Sir T. Plumer, in the above cited case of *Widdowson* v. *E. of Harrington.*

(383.) A Writ of Right may be brought F. N. B. 1.
after judgment in a Possessory Action, and is [Sec 375, n.]

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words, " if any person do sue any of the *said* actions or " writs, &c. and cannot prove," &c. It seems, therefore, that an Action founded upon the seisin of a person who is neither Ancestor, nor, in the legal sense, Predecessor to the Demandant, cannot be affected by the Statute, unless by analogy.

in general the last resort where other remedies fail; but, from the complicated nature of its machinery, it is never made use of where any other proceeding would suffice. By the Statute in question, the seisin of the Ancestor or Predecessor must here be shown to have been within sixty years before the commencement of the Action. (384.) The word Predecessor, it
(378.) must be observed, cannot possibly in this case be taken in a general and popular sense; for in a Writ of Right the Demandant must either
F. N. B. 5; Dally v. King, 1 H. Bl. 1. himself have been actually seised, or must claim by Descent, or by Succession in a Corporate capacity, from one who has. (385.) The Law however, is not scrupulous as to the means by which this ancient seisin was acquired, if the present right to the land can be sufficiently
Litt. s. 482. proved. Thus, where *A.* being tenant for life, with remainder to *B.* in fee, *B.* disseised *A.*, who afterwards re-entered, and restored himself to the possession; this wrongful and temporary seisin of *B.* was held sufficient in a Writ of Right afterwards brought by him against a
Co.Litt. 281. a. third person. And so, if *A.* be tenant for life, with remainder to *B.* for life, remainder to *A.* in fee, the heir of *A.* may have a Writ of Right against an Intruder, though his Ancestor's possession was by virtue of the estate for life and not of the fee.

(217.) (386.) Since the St. 1 Eliz. c. 19, by which Archbishops and Bishops, and that of 13 Eliz. c. 10, by which Colleges, Deans and Chapters,

Hospitals, Parsons and Vicars, are prohibited from alienation for a longer period than three lives, or twenty-one years, no length of time, even after a Fine, is allowed to bar these Corporations of their rights (*a*). (387.) And the Crown, being by Prerogative exempt from the ordinary effects of the lapse of time, and from the operation of all Statutes in which it is not expressly named, was never restricted in this respect till by St. 9 G. 3, c. 16, a continual neglect for sixty years was made a bar to its claims.

Magd. Coll. Case, 11 Co. 78. b.

(388.) With respect to the cases before alluded to, where the right of entry being lost, all remedy fails; they arise from the want of an actual seisin, which renders the ordinary forms inapplicable, and from the neglect of the Legislature to provide special remedies. Whoever claims under a Will an estate which was to take effect in possession, either immediately (375.)

[(*a*) But now, by s. 29, of the late act, any Archbishop, Bishop, Dean, Prebendary, Parson, Vicar, Master of Hospital, or other Spiritual or Eleemosynary Corporation sole, may make an entry or bring an action or suit at any time after the right first accrued, within the period made up of *two successive incumbencies* of the Office or Benefice in respect whereof the land is claimed, and *six* years after a third person shall have been appointed thereto, if such two incumbencies and six years together amount to *sixty* years; and if not, within such further number of years as will make up the period of *sixty* years;—and no such entry, action, or suit shall be brought at any time beyond such period.] [3 & 4 Wm. 4, c. 27.]

upon the Testator's death, or by executory devise at any time afterwards, appears to be in this situation; if he do not take possession of the land devised to him, but suffer his right of entry to be lost, he becomes remediless. (389.) And so it is of a person to whom a reversion or remainder expectant upon an estate of freehold is given by will, if there has been no actual seisin in the Devisee of the Particular Estate. But if such seisin can be proved, the Writs of Intrusion, and of Entry in Casu Proviso, and in Consimili Casu, before mentioned, may be applicable: (390.) and if the devise be subject only to a chattel interest preceding, it seems probable that it would be held to confer a virtual seisin sufficient to support an Action brought within thirty years from the expiration of that interest. (391.) It has been held also, that a Devisee's right of entry is not taken away by a descent to the heir of the person in adverse seisin. (392.) And it is to be observed that where Lands are devisable by ancient custom, (as in Kent, London, Oxford, Great Yarmouth, &c.) there is a customary Writ, called *Ex gravi querelâ*, by which it seems the Devisee or his heir may still recover, at any time within fifty years from the Testator's death.

2 Scho. & Lefr. 623; 2 J. & W. 139. 152.

Eastman v. Baker, 1 Tau. 174.

(302.)

Bushby v. Dixon, 3 B. & C. 298.

(367.)

Cro. Car. 201, and v. 7 East, 321. sed contr. Co. Litt. 111. a.

Co. Litt. 111. a. F. N. B. 198.

(393.) It does not appear to have been ever decided, whether the virtual possession given by the Statute of Uses amounts to such a seisin as without any actual entry may be sufficient to support a Real Action. However, as it seems

See Butl. Co. Litt. 266. b. n. A.

to be settled that such possession is not sufficient to maintain an action of Trespass, and as the seisin in a Real Action is always alleged as having been accompanied with an actual taking of the profits, (or *Esplees* as they are called,) it may be thought a legitimate conclusion, that a person who acquired his estate in any land under the Statute of Uses, if, never having been seised, either actually by his own entry, or virtually by the occupation of a Tenant for years or at will, he suffers his right of entry to be lost, will have no remedy left. It is not impossible that such cases may occur; as where there is a shifting use to arise upon some obscure event, the person entitled to it may be ignorant that his right has accrued, and may therefore suffer twenty years to elapse; which, if the doctrine just advanced be law, will secure the actual Tenant in his possession.

Cro. Jac. 604; Cart. 66. per Bridgman, C J.

(390.)

(394.) Where a conveyance has been made, subject to a Condition at Common Law for defeating it in a given event, the Grantor and his heirs have only a Title of Entry in that Event, and no right of action.

(23.) Co. Litt. 345. b.

(395.) It has been mentioned that the Fine of a Joint-Tenant or Tenant in Common, (and consequently that of a Coparcener,) though purporting to comprise the whole land, will not of itself affect the estate of the Conusor's Companion; nor will his simply taking all the profits of the land without accounting to his companion, constitute such an *adverse possession*

(100.) (317.)

Fairclaim v. Shackleton, 5 Burr. 2604. But see 2 Atk. 631; also Doe v. Hulse, 3 B. & C. 757.

as by lapse of time will make the claims of the latter unavailable. If nothing further has been done to his prejudice, he must be considered as still in possession (*a*). In these cases it is often difficult to ascertain what shall amount, or not, to an absolute exclusion from the Tenement. (396.) So much is clear, that no person can be disseised of an undivided part of his estate: if he be solely entitled to the land, the disseisin, (to whatever measure of territory it may extend or be confined,) must be absolute and exclusive; for the partnership interests above mentioned can only arise by contract or act of law; and when two persons are actually present upon land, into which one of them only has the right of entry, the law adjudges the possession to be in him who has that right. (397.) So, if a person be entitled to an undivided moiety, or third part, he cannot be divested of any fraction of that share, though he may be disseised of his whole moiety or his whole third part. (398.) It has been laid down that a Feoffment of the whole land by one partner or companion, through the violent operation attributed to this mode of conveyance, is sufficient to work a disseisin: but it may be doubted whether this will be the

Reading v. Royston, 2 Salk. 423.

Anon. 1 Salk. 246.

Co.Litt. 374.a.

[St. 3&4W. 4, c. 27.]

[(*a*) The late act declares, (s. 12,) that the possession of one coparcener, joint-tenant, or tenant in common, for his own benefit, or for the benefit of any person, other than the person entitled to the other share, shall not be deemed the possession of such last-mentioned person.]

case if the Use be declared or result to the Feoffor. A Fine to his own use would not (as we have seen) have this effect; and still less a Lease and Release, which is always an innocent conveyance. (399.) If however any ostensible conveyance of the whole land be made to the use of a stranger, it can hardly be contended that an exclusive enjoyment by the latter is not a commencement of adverse possession. (400.) On this subject it may be observed generally that while there subsists any contract, express or implied, between the parties in and out of possession, the possession cannot be adverse. Thus if a Mortgagor remain in possession of his land with the Mortgagee's consent, (which is generally the case while interest on the debt continues to be paid,) no length of time, while that consent appears to continue, will deprive the latter of his right of entry (*a*). So where the legal estate is vested in a Trustee, the beneficial owner, (or *Cestui que Trust*,) may continue in possession without any prejudice to

(100.)

Doe *v.* Hulse, 3 B. & C. 757.

(24. 108.)

(9. 11.)

[(*a*) See *Doe* v *Williams*, 5 Ad. & Ell. 291. In this case a doubt was expressed by one of the Judges as to the effect of the 2nd and 3rd sections of the late act on the right of entry or action of the mortgagee. This doubt has been partially removed by St. 1 Vict. c. 28, which gives the mortgagee twenty years from the last payment of any part of the principal money or interest, to make his entry or bring his action or suit, although more than twenty years may have elapsed since the right so to do first accrued.]

[3 & 4 W. 4, c. 27. See 301, n.]

Litt. 463. that legal estate (*a*). (401.) In both these cases
[See 370,n.] (19.) the law considers the occupier as Tenant at
[1373, &c. Will, under the person *who in a Court of Law*
1458, &c.] is regarded as the true owner.

(375.) (402.) The distinction taken in the present section between rights of Entry and Rights of
[See 375,n.] Action, though it accord with the strict language of ancient Law, may seem, when referred to the ordinary practice of our own time, to require explanation. It should be observed, then, that the right of Action here spoken of is
(22.46.106. (303.) the right of bringing a Real Action, *i. e.* one in which the inheritance, or at least the Freehold, is the thing immediately in demand, and which must therefore in all cases be brought against
[See 375,n.] the actual Tenant of the Freehold. But this is not the only, nor by any means at this day the most usual, judicial proceeding, by which the right to land may be vindicated or decided. (403.) The right of Entry involves in itself a right of Action of a different kind; namely, the right of bringing an Ejectment. Here the subject in demand is not a Freehold, but a Chattel Interest which has been created, or rather is feigned for the purpose of expeditiously bringing the matter to a legal trial.
2 Bac. Ab. Ejectment. The Writ of Ejectione Firmæ, or Ejectment, is the regular remedy for a Farmer or Lessee

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[(*a*) But as to the doctrine of presumption of reconveyance or surrender by the Trustee to the *Cestui que trust*, see below, 621, &c., 914, &c., 1599.]

for years when deprived of his possession: (404.) and to make it available for the trial of a more important Title, it was anciently necessary to pursue the following steps. The party who supposed himself entitled to enter upon the land, did actually enter, and being so in possession made a lease for a term of years to a friend; the lessee entered, and then suffered himself to be ousted or dispossessed by the adversary; and upon this, brought his Action of Ejectment against him, in which the Title of the Lessor would necessarily come in question. (405.) The contrivance was so convenient that the Courts of Law lent their aid to simplify it, which could only be done by substituting fictions for acts of mere formality. Accordingly under the present system no entry nor lease is made, and the lessee, the nominal Plaintiff, is generally a man of straw; who, according to his nature, brings the action not against the Tenant or person actually in possession of the land, but against another man of straw; *Doe*, for instance, against *Roe*, or *Goodtitle* against *Badtitle*. Of this, however, notice is duly given to the Tenant; and if he does not then make a proper application to the Court to be admitted Defendant in the place of his unsubstantial representative, judgment will be allowed to pass by default, and this will be followed by a Writ to the sheriff, directing him to give possession of the land to the pretended Plaintiff, and what seems more material, to remove

all other persons from it. But upon the application of the Tenant he will be admitted to defend the Action, under the condition that he confess Lease, Entry and Ouster, and insist only upon his Title. (406.) The Entry here mentioned is the entry of the Lessee; but the confession of a Lease implies that of a previous entry of the Lessor for the purpose of making
Touchst. 269. Co. Litt. 48. b. it; for one who is divested of his estate can no more make a Lease, until he be reinstated, than he can any other conveyance. (407.) By these arrangements much trouble is saved to the Plaintiff's Lessor, (who is indeed the true *Plaintiff or Demandant,) and the Action of Ejectment is made a most convenient instrument for enforcing every claim to land, which consists of an †adverse right of immediate entry, attended with the power of making a Lease,

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* (408.) In consequence of the true Demandant not being identical with the nominal Plaintiff, the same question may be contested more than once between the same parties in several Actions of Ejectment. 1 Phil. Ev. 333. This practice, though open to abuse, is in some cases an advantage to Justice; as where the result of the first Action is determined by an imperfection of evidence which can afterwards be rectified.

† (409.) Ejectment may be brought against the Plaintiff's Companions in Estate, who however will not be obliged to confess Ouster. 7 Bac. Ab. 443; 2 Tau. 397. But it cannot be brought against a person in exclusive possession under a subsisting Contract with the Plaintiff, though in strictness of law a mere Tenant at Will, unless that Tenancy be previously determined by a demand of the possession. *Doe* v. *Jackson,* 1 B. & C. 448.

which may confer the same right on the Lessee. (410.) The only case where the Defendant's confession of entry is not considered tantamount to an actual entry by the true Plaintiff, arises in consequence of a Fine; to avoid the effects of which an actual entry (*a*) must be made during the five years allowed by the Statute, before an Ejectment can be brought. (411.) On the other hand, by Stat. 4 Ann. c. 16, s. 16, it is enacted, Doe *v.* Watts, 9 East, 17.

"That no Claim or Entry to be made of or "upon any Lands, Tenements or Heredita- "ments, shall be of any force or effect to avoid "any Fine levied or to be levied with Procla- "mations, according to the Form of the Statute "in that case made and provided, in the Court "of Common Pleas at Westminster, or in the "Courts of Sessions in any of the Counties "Palatine, or in Courts of Grand Sessions in "Wales, of any Lands, Tenements or Heredita- "ments, or shall be a sufficient Entry or Claim "within the Statute made in the twenty-first "year of King James I. intituled, An Act for "limitation of Actions, and for avoiding of "suits in Law, unless upon such entry or "Claim, an Action shall be commenced within "one year next after the making of such entry "or Claim, and prosecuted with effect."

[(*a*) By s. 10, no mere entry shall confer the possession; but ss. 37 & 38 save any existing rights of action, where the rights of entry are lost, if enforced within the periods provided by the act.] [3 & 4 W. 4, c. 27.]

SECT. 7.—*Of Evidence of Title to Land in Fee Simple.*

(412.) THE Ends of Law are Justice and Peace; and in proportion as the Law is fixed and systematic, and its administration powerful and certain, not only is Justice obtained between litigants, but Peace assured to the community. It is with a view principally to the latter of these advantages that it is proposed here to consider some of the most usual Evidences of Title; by which, conspiring with the Law, men are secured in the full enjoyment of their possessions, and in the expectation of receiving the full value for them on alienation. (413.) Some kinds of evidence will therefore be noticed, which, though not allowed in Courts of Justice, may be satisfactory to a reasonable man, as showing the improbability of the existence of any lawful claims against his estate: (414.) and but little regard will be shown to the variety of modes in which evidence may be exhibited in the course of litigation; because, whether by the admission of the authenticity of writings, and the truth of other facts, the whole matter be reduced into a question of Law, to be decided by the Judges only; or by a denial, general or special, of some assertion, a mixed question of law and fact be submitted to the cognizance of a jury, under the direction of a Judge, and subject still to a more solemn decision through the reference of

a Special Verdict or Case, or the corrective application for a new Trial, or some similar contrivance, it will be found that most of the rules of Law relating to evidence are equally efficient, though differently applied; and that these changeful forms of proceeding, while they adapt themselves conveniently to circumstances, do not greatly affect the certainty of right.

(415.) First then, the mere possession of land, if unexplained, is *primâ facie* evidence of an Estate in Fee Simple; and is a sufficient ground for maintaining an action of Trespass against every unlawful invader. (416.) We have seen also that an exclusive possession of land for twenty years affords a legal security to the possessor, against all Entries and Actions of Ejectment on the part of any person whose right of possession had commenced, (whether in himself or in another whom he represents,) before the commencement of that period, and who is not protected by an original and uninterrupted disability continuing within the last ten years of the same period. We may add that such a possession, supposing it to be at last interrupted, constitutes a sufficient title for the late possessor, in an Action of Ejectment brought by him against any person who, not having a right capable of being enforced by the like Action, has dispossessed him. (417.) And an exclusive possession for sixtyy ears is a perfect bar to all claims and actions whatsoever, (except those of the Church,) which are founded upon a

4 Tau. 17. 547; 5 Tau. 326.

Harper v. Charlesworth, 4 B. & C. 574.

(370, 371, 372, 373,) [& the notes.]

Denn v. Barnard, Cowp. 595.

See Sug. Vend. 289. 335.

(383.)

right of possession existing at a more ancient time (*a*).

(418.) Every Title must rest ultimately upon mere possession; and an apparent possession in fee simple sixty years before the present time, without any just ground of suspicion that there were then other rights in existence which might afterwards for the first time become possessory, is evidently a satisfactory commencement of Title (*a*). But the fact of such possession scarcely

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[(*a*) And now, an exclusive possession for *forty* years will be a bar to all *such* claims and actions; (see above, 371, n.;)—and those of the Church will be barred by an exclusive possession for the period specified in (386. n.)

Previously to the late Statute of Limitations, (3 & 4 W. 4, c. 27,) it was the practice, on the purchase of a real estate, to require the state and history of the title to be shewn for a period of sixty years back, at the least; and the question now arises, whether the old rule in this respect is still to be followed, or whether a shorter period must now be deemed sufficient. Though the period of sixty years was probably adopted on the ground of its being the shortest period which, as stated above, would be a perfect bar to all actions founded on a right of possession *existing at a more ancient time*, yet it at the same time afforded a generally adequate protection also against *future* adverse rights of possession; as, for instance, where the vendor professing to sell the fee-simple, is in reality entitled only for his life.

It is clear that to lay down as the general rule that a *forty* years' title shall be deemed satisfactory, would leave the purchaser without any adequate protection against the latter chance of danger: indeed the old rule would, in some cases, prove inadequate for the purpose; but it was necessary, in practice, to adopt some definite period beyond which (except in cases where the state of the Title afforded just

admits of direct proof from any private documents. Deeds of Feoffment indeed (unless of very ancient date) have commonly an attestation of the Livery of Seisin indorsed upon them; but these are now much disused; and there is no other mode of conveyance which imports in itself an actual, (as distinguished from a fictitious,) transfer of the possession. (419.) Reason however requires that whatever professed transfer of Land appears to have been made in former times, should, if it be consistent with the present possession, be admitted as an actual transfer. For otherwise, (no suspicion of forgery being supposed,) it seems next to impossible to account at once for the existence of the instrument, and for the present possession according to it. And, therefore, upon a sale of land, an unbroken chain of instruments of conveyance for sixty years, ending with one to the Vendor Co. Litt. 7 a.

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ground of suspicion,) a vendor should not be called upon to trace back his title. And as the period of sixty years was necessary to give a purchaser the full benefit of the old Statutes of Limitation, and at the same time seemed a reasonable limit to protect him against such future rights, the rule became generally established. The general practice among conveyancers is still, it is believed, to adhere to the old rule in this respect; though perhaps with a greater readiness than heretofore to waive a strict compliance with it, where the circumstances of the title are such as to admit of such relaxation with apparent safety. See Mr. Brodie's opinion in Hayes's Introd. to Conv. 230, in favour of the old rule, and 2 Sugd. V. & P. 132, &c. in favour of a shorter period.]

himself, who is in possession, is always sufficient to satisfy the Purchaser, without any further proof of ancient seisin. (420.) And this agrees
2 Bac. Ab. 648. with a rule of Law, that where a Deed of Feoffment has been followed by possession, the Jury ought to presume the livery of seisin to have been duly made (*a*). (421) On the other hand, it is not sufficient for a Plaintiff in Ejectment,
2 Stark. Ev. 535. (who is necessarily out of possession,) to produce a Conveyance of the Land to himself from a Stranger, unless he prove the latter or himself to have been in possession; and this holds still
2 T. R. 55. more strongly of a Will. (422.) That mere
(415.) possession is *primâ facie* evidence of a Fee, if it be not a positive rule adopted only to prevent judicial indecision, must depend upon the improbability of the existence of a partial ownership without producible evidence of its creation, But possession, accompanied with an apparent exercise of ownership over the whole Fee, seems to constitute a substantive evidence of Seisin in Fee; and, we may add, of a rightful Seisin; for neither law, nor reason where law prevails, will presume a wrongful act. (423.) Every conveyance, therefore, which implies Possession, must, though in a minor degree, imply right; and this in some proportion to its antiquity; for the

[(*a*) No possession short of twenty years under a Feoffment is presumptive evidence of livery. *Doe dem. Wilkins* v. *Marquis of Cleveland*, 9 B. & C. 864. See too *Doe* v. *Wainwright*, 5 Ad. & Ell. 520.]

tract of time in which adverse claims have not been asserted lessens the probability of their existence.

(424.) But here some distinctions occur relating to the nature and circumstances of the Instruments. For it is evident that a Sale of the Land, or a Mortgage, (which is indeed a kind of Sale, though the alienation be less complete,) affords a stronger presumption of Title, and even of possession, than a Marriage Settlement; a Marriage Settlement than a Voluntary Settlement; a Voluntary Settlement than a Devise by Will; and this last than the mere silent succession of an heir*. (427.) The *Description* of the land is also of great importance; for this may be so general and vague as scarcely to prove any thing with respect to particular parcels; or if it be more detailed, it may vary greatly from the description by which the land in question is at present known. Either of these defects may be palliated by an assertion of identity contained in a subsequent instru-

Doe v. Plowman, 2 B. & Ad. 557.

* (425.) These degrees of presumption depend principally on two considerations; the one being, the probability that the Title was duly investigated at the time, and that a defect then perceived would either have put a stop to the bargain, or have been recognized in some stipulation contained in the Conveyance itself; (which inseparable recognition, however, most Purchasers have the cunning to avoid); (426.) the other, the length of time during which the possession, acquired by that transaction, has been adverse to the claims which it is supposed to refute.

ment: but the degree of credit due to this assertion must depend on nearly the same circum-
(422. 423.) stances as the general presumption of *Title* arising from the same instrument, which, it may be observed, is not increased by particularity of description, though the presumption of *possession* is. There may be cases, however, where the general presumption of Title is slight, and yet the presumption that identity was truly asserted is strong. As, if in a Voluntary Settlement mention be made of a recent alteration of internal boundaries, or the like.

Clarkson v. Woodhouse, 5 T. R. 412. n.

(428.) Leases made by a person from whom the Plaintiff, in an Ejectment, derives his title, are not admissible as evidence of that person's seisin, without proof of an actual possession by the Lessees; unless the estates created by the Leases appear to have expired before the time of living memory. But the rational presumption from the mere existence of such instruments, in favour of the person now in possession of the land by a Title ostensibly derived from the Lessor, appears, so far as concerns the fact of the Lessor's actual possession, to be at least equal to that which would arise from a Voluntary Settlement of the same date.

2 Stark. Ev. 524; Parry v Hindle, 2 Tau. 180.

(429.) A Receipt for Rent is evidence between the parties to it of the relation of Landlord and Tenant subsisting between them, in respect of the Lands described in the Receipt. And after the death of the Tenant, it would, if

Doe v. Robson 15 East, 32; 1 Turn. 52.

produced from the proper custody, be evidence of the same fact between other parties. (430.) A Memorandum made by a Steward, in a book kept by himself, of rent received for his Master, is evidence, after the Steward's death, that his Master was Landlord of the property there described; for the statement of the sum received is an admission against the Steward's interest, and would have been sufficient to charge him: (431.) but a like Memorandum made by the Landlord himself is not evidence for those who derive their title from him: for it is a general and just rule of law that a man cannot make evidence for himself. Such a document, however, would deserve the attention of a purchaser; and its credit might seem to be enhanced by the impossibility of its being used as legal evidence.

Barry v. Bebbington, 4 T.R. 515; Harpur v. Brook, 2 Bac. Ab. 637.

Outram v. Morewood, 5 T. R. 123; 2 Ves. 43.

(432.) On the principle that where a fact is against a person's interest, his admission of it may be used as evidence between litigant parties after his death when he can no longer give his testimony in person; combined with the maxim before mentioned, that mere possession is *primâ facie* evidence of seisin in fee; the declaration of a deceased occupier of land, that he held it as *A.*'s Tenant, will be admitted to prove the seisin of *A.* (433.) So, if a person in possession, without any apparent Title, admit himself to be only Tenant for Life, and that after his death the land will go to *A.* (who is the right owner,) this admission is evidence

(430.)

(415. 422.)

Uncle v. Watson, 4 Tau. 16.

Doe v. Pettett, 5 B. & A. 223; see Barker v. Ray, 2 Russ. 63.

for *A.*, so far as to prevent his being barred by the Statute of Limitation, as upon an adverse possession (*a*).

(434.) Maps are often referred to by Deeds of Conveyance; and then, whether mechanically annexed or not, they become incorporated parts of the descriptions contained in those Deeds. But without such connexion, a Map or Survey may be received as evidence of boundaries against, though not in favour of the person by whose direction it was made, and between or against those who derive their Title from him. The general credibility of these documents, when no inaccuracy appears, is perhaps little inferior, for proof of possession, to that of old Leases.

Bridgman *v.* Jennings, 1 Ld. Raym. 734, 1 Phill. Ev. 255; Allot *v.* Wilkinson, 4 Gwill. 1585; Anon. 1 Stra. 95.

(435.) When the proof of ancient seisin by private documents is defective, it is usual for a purchaser to require extracts from the Land Tax Assessments of the County or other District, or from the Rate Books of the Parish, within which the Lands are situated. The Annual Land Tax Acts from 1692 to 1798 imposed a fixed sum upon each of the districts into which Great Britain was divided for the purpose, to be levied by Commissioners for that district, through the medium of Assessors and Collectors. The business of the Assessors was to assess or ascertain the proportion of this sum,

[Doe *v.* Seaton, 2 A. & E. 171; Doe *v.* Arkwright, ib. 182, n.]

[(*a*) See now, St. 3 & 4 W. 4, c. 27, s. 14; above 370, n.]

payable by every Tenant of Lands, Tenements or Hereditaments, and to certify their Assessment in writing to the Commissioners. In the more recent of these Annual Acts, it was provided that the Books of Assessment delivered to the Commissioners, and all Minute Books and other Public Books and Papers relating to the Land Tax, should be the property of the Commissioners for the time being in succession, "as Records of and belonging to them the said "Commissioners for their use and inspection," and should remain in their custody, or that of their Clerks, &c. And by the first section (which is still in force of Stat. 38 G. 3, c. 60, (which Act first made the Land Tax perpetual and subject to redemption,) all these arrangements are continued. From the words above cited, and the general rule of law relating to what are called Records, it would appear that a sworn copy of an Assessment might be produced in a Court of Justice as evidence of possession, were it not that the "use and inspection" of these documents seem to be confined to the Commissioners themselves. There can be no doubt however that for private satisfaction, the evidence thus afforded is of great weight.

[Doe v. Seaton, & Doe v. Arkwright, *ubi supra.*]

See Ongley v. Chambers, 1 Bing 483.

(436.) The Rates or Assessments imposed by the Churchwardens and Overseers of the Poor under St. 43 Eliz. c. 2, s. 1, on the occupiers "of Lands, Houses, Tithes Impropriate, Propri-"ations of Tithes, Coal Mines, and Saleable "Underwoods," are directed by St. 17 G. 2, c.

38, s. 14, to be entered in a Book, which is to be carefully preserved in some public place whereto the Parishioners may freely resort, and to be produced at the Quarter Sessions when any Appeal against a Rate is to be determined. This direction to produce the Book itself seems to exclude the evidence of copies; and the provision for its custody may be thought to prohibit its production in Court on any other occasion than that which is specified. The right of inspection however affords a facility of obtaining copies, which may be very conducive to the clearness of the Vendor's Title.

(437.) It is desirable, with a view to the marketableness of land, that the whole evidence of Title should be contained in such written documents as are either admissible in Courts of Justice, or at least have not the appearance of being composed for the occasion. It is often necessary, however, to have recourse to living testimony, in the form of (*a*) Affidavits by disinterested persons acquainted with the facts. And the fact of present possession which is the basis of all the rest, is generally a matter of sufficient notoriety.

[(*a*) By St. 5 & 6 W. 4, c. 62, for the abolition of unnecessary Oaths, any Justice of the Peace, Notary Public, or other Officer authorized to administer an oath, is empowered to take voluntary *Declarations* in the form specified in the Act. And any person wilfully making such declaration, false, in any material particular, shall be guilty of a misdemeanor]

(438.) Supposing the proof or presumption of ancient seisin and right to be sufficient, we are next to consider the means by which that seisin and right have been transmitted to the present possessor; *i. e.* the Alienations and Descents which have occurred within the period of our investigation.

(439.) Deeds of Alienation are for the most part Indentures; but they are sometimes Deeds Poll, *i. e.* single Deeds, in the form of Manifestoes or Declarations to all the world of the Grantor's act and intention. (440.) In either case it is evident that the Seal* and Signature of the Grantor must appear upon the Deed. For though each *Part* (or executed copy) of an Indenture duly executed is of the same force and validity in itself as any other or all together, and it is not necessary that all parties, or that the Grantor should execute every part, yet it is obvious that a Counterpart, (or Part not executed by the Grantor,) does not bear in itself satisfactory evidence, nor with the addition of oral testimony can it ever constitute the best evidence, that the Indenture has been executed at all by him who is the principal and indispensable party. (441.) The execution by the

(140. *n.*)

(20. 166. 267.)

Co. Litt. 229. a. But see Touch. 53; Munn v. Godbold, 3 Bing. 292.

* (440 *n.*) As to Delivery, see Touchst. 57; *Doe* v. *Knight*, 5 B. & C. 671. And how the effect of the delivery may be suspended, so that the Writing (which is then called an *Escrow*, Co. Litt. 36. a.) shall not become a Deed until some condition is performed, see *Johnston* v. *Baker*, 4 B. & A. 440; *Murray* v. *E. of Stair*, 2 B. & C. 82.

[R. *v.* Inh. of Longnor, 4 B. & Ad. 647.]

Co. Litt 230.b. See Bland v. Inman, Cro. Car. 288, 3 Bing. 222.

Grantee, when the Deed contains no engagement on his part, scarcely serves any other purpose than to show his assent to the Grant; which, in the absence of evidence to the contrary is always presumed. (442.) It is necessary, however, that all persons who are intended to take any **immediate* estate or benefit by an indenture should be *named* in the beginning of it as parties. (443.) Any rasure or alteration made by the party benefited, or, it is said, even by a stranger if in a material part, (though not perhaps if the party can clearly exculpate himself,) or cancellation or destruction of Seals, (unless merely accidental,) will make a Deed void which has once been good; but alterations in the writing must in general, it is thought, be presumed to have been made before execution until the contrary appear; (444.) and in Conveyances of Real Property, (considered merely as such, and without regard to their accessory or incidental contents,) it is immaterial, except

Thompson v. Leach, 2 Ventr. 198.

Co. Litt.231.a.

Touchst. 68, &c. 2 Bac. Ab. 649, &c. 6 East, 312. See also Matson v. Booth, 5 M. & S. 223.

Sug. Pow. 121.

Doe v. Bingham, 4 B. & A. 672.

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* (442. *n.*) This Rule does not extend to Remainders, (Co. Litt. 231. a. 259. b.) nor, it is commonly said, to Uses, created by the Indenture. 2 Prest. Conv. 394. But *Sammes's Case*, 13 Co. 55, there cited, is not directly in point. And it is now held that a Power of Attorney may be given by Indenture to a person who is not named as a Party. Co. Litt. 52. b.; 3 M. & S. 323. Also a person not named as a Party may enter into a Covenant with one who is named; but this Covenant cannot be mutual. *Salter* v. *Kidgly*, Carth, 76; *Berkeley* v. *Hardy*, 5 B. & C. 355.

as to the evidence of original validity, whether the Deeds continue in force or not; for their whole effect to this purpose is instantaneous, and the estate which has once passed cannot be recalled.

(445.) In addition to the Grantor's Seal and Signature, (the former of which, though once the great test of authenticity, is now a mere ceremony, like the indenting of the parchment,) it is usual for witnesses to attest the acts of signing, sealing and delivery, by the subscription of their names to a form of words to that effect written at the foot or on the back of the Deed, which for private purposes is generally sufficient to authenticate it. (446.) In Courts 2 Bac. Ab. 647.
of Justice too a Deed * thirty years old is said 1 Phil. Ev. 476.
to prove itself, so that no inquiry is made for the witnesses; (447.) and a Bargain and Sale, (146.)
though recent, is sufficiently authenticated by the Memorandum of Inrolment indorsed upon it by the proper officer: which is also conclusive as to the † *time* of Inrolment. (449.) The Kinnersley v. Orpe, Dougl. 56; Smartle v. Williams, 1 Salk. 280; Com. Dig. Barg. & Sa. B. 10.

* (446. n.) So when other documents, of equal antiquity, are produced from the proper custody (*a*), no proof of hand-writing is required. *Wynne* v. *Tyrwhitt*, 4 B. & A. 376.

† (448.) So under the Registry Acts, the Certificate of Registration, with the day and hour of it, indorsed upon (236.)

[(*a*) The deed, too, it is to be understood, must come from the proper, or at least ***not an improper*** custody. See *Doe* v. *Samples*, 8 Ad. & Ell. 151.]

date expressed in a deed, whether old or recent, 2 Inst. 674. is always presumed to have been the time of execution until the contrary be shown. (450.) The usual formality of attestion (however important) is not essential to the validity of any deed, unless it be made in exercise of a Power which has prescribed that as a requisite circum- Sug. Pow. 239. stance; but in this case the requisition must be strictly complied with; insomuch that if a person be empowered to appoint Uses "by writ- "ing under his *hand* and seal attested by two "witnesses," and the clause of attestation to the Instrument of Appointment be only "Sealed and Delivered by," &c. without the word *Signed*, the Appointment is void. This oversight having frequently been committed, the St. 54 G. 3, c. 168, was passed to remedy it by a retrospective operation; but without extending to future transactions.

(451.) A Deed is not available in Court unless it be stamped in the manner required by certain Statutes for the benefit of the Revenue; and this ought regularly to be done before execution. But by St. 37 G. 3, c. 136, s. 2, the See Burton v. Kirkby, 7 Tau. 174; Rippines v. Wright, 2 B. & A. 478. Stamp may be affixed afterwards, on payment, in addition to the duty, of a penalty of 10*l*.(*a*)

the instrument expressing also the Book, Page and Number, and signed by the Registrar, &c. is to be taken and allowed as evidence of the Registry.

[(*a*) It would seem that the penalty is only £5 per skin or sheet; the St. 37 Geo. 3, c. 136, s. 2, having im-

for every Skin of Parchment or Sheet of Paper (*b*): and by St. 44 G. 3, c. 98, s. 24, this penalty may be remitted, if the application be made within twelve months after the execution, and the Commissioners be satisfied that no fraud upon the revenue was intended.

(452.) The principal Statute by which the existing duties for Great Britain have been imposed, is the 55 G. 3, c. 184, by which the Conveyance upon the Sale of any Lands, Tenements, Rents, Annuities, or other property, real or personal, or of any right or interest therein, was subjected to an **Ad Valorem* Duty upon the purchase money; *viz.* For "the principal "or only Deed, Instrument or Writing," by which the transfer is effected, if the "Pur- [Belcher *v.* Sykes, 6 B. & C. 234; Doe *v.* Preston, 7 B. & C. 392; Blandy *v.* Hubert, 9 B. & C. 396.]

* (452. *n.*) The first Act which imposed an *Ad Valorem* Duty on Conveyances upon Sales was the 48 G. 3, c. 149.

posed the £10 penalty in lieu of accumulated penalties of £5 each which had become payable under former acts. On the consolidation of the duties, by Stat. 44 Geo 3, c. 48, and 55 Geo. 3, c. 184, the Stamp Office returned to the £5 penalty imposed by earlier acts. See Chitty's Stamp Acts, p. 255; Coventry's Stamp Acts, App. p. lx.]

[(*b*) The deed may be stamped at any time before it is produced in evidence, and the Court will not inquire, it seems, whether any, or the proper penalty has been paid. *R.* v. *Inh. of Preston,* 5 B. & Ad. 1028.]

" chase or Consideration Money therein or " thereupon expressed,"—

			£	s.	d.
Do not amount to		£ 20	0	10	0
Amount to £ 20, and not to		£ 50	1	0	0
50		150	1	10	0
150		300	2	0	0
300		500	3	0	0
500		750	6	0	0
750		1,000	9	0	0
1,000		2,000	12	0	0
2,000		3,000	25	0	0
3,000		4,000	35	0	0
4,000		5,000	45	0	0
5,000		6,000	55	0	0
6,000		7,000	65	0	0
7,000		8,000	75	0	0
8,000		9,000	85	0	0
9,000		10,000	95	0	0
10,000		12,500	110	0	0
12,500		15,000	130	0	0
15,000		20,000	170	0	0
20,000		30,000	240	0	0
30,000		40,000	350	0	0
40,000		50,000	450	0	0
50,000		60,000	550	0	0
60,000		80,000	650	0	0
80,000		100,000	800	0	0
100,000 or upwards			1,000	0	0

(453.) " The Purchase, or Consideration " Money, is to be truly expressed and set forth " in words at length;" and there are penalties for neglecting this injunction, which it is also for the interest of the Vendor to observe, as by St. 48 G. 3 c. 149, s. 24, the Purchaser may recover any money paid by him which is not

so expressed and set forth: but it seems that, as the Duty is only on the Consideration Money *expressed*, the Deed would not be vitiated by the omission, though drawing with it the non-payment of the true duty, and the absence of the appropriate Stamp. (454.) In addition to the *Ad Valorem* duty, the Principal Instrument is subjected to a duty of 1*l.* for every entire quantity of 1080 words contained in it, except the first. (455.) Deeds in general, which are not charged with the *Ad Valorem* or any other specific duty, pay one of 1*l.* 15*s.*, with the addition of 1*l.* 5*s.* for every entire quantity of 1080 words, except the first. (456.) But where the Conveyance on a Sale or Mortgage isby Lease and Release, the Lease, if the Consideration Money be under 20*l.*, is charged with 10*s.* only; if under 50*l.* with 15*s.*; and if under 150*l.*, with 1*l.* (*a*); and that a Feoffment, or Bargain and Sale, may not, as consisting but of one deed, pay a lower duty, on such occasions, than a Lease and Release, the duty which would be incurred by the Lease is accumulated upon the single instrument. (457.) It is further provided, that where Property held by different Titles, or to be enjoyed by different persons, is purchased at one time, but conveyed by separate Instruments, the parties may apportion the Consideration Money as they think fit. (458.) And it is added, that if the property be sold subject to any sum of

5 M. & S. 234; Doe *v.* Hobson, 3 Dow. & Ryl. 186; [Doe *v.* Lewis, 10 B. & C. 673.]

[(*a*) And if £150 or upwards, with £1 15*s.*]

money charged on it by Mortgage or otherwise, whether that sum be due to the Purchaser or to another, it shall form a part of the Purchase Money on which the duty is to be paid*.

(459.) Mortgages are also subject, under the same Act, to an *Ad Valorem* Duty upon the amount of the Loan, or principal sum secured(*a*); *viz.* if it do not exceed 50*l.* to a duty of 1*l.*

			£.	s.
If it exceed £ 50,	and do not exceed	£ 100	1	10
100	....	200	2	0
200	....	300	3	0
300	....	500	4	0
500	....	1,000	5	0
1,000	....	2,000	6	0
2,000	....	3,000	7	0
3,000	....	4,000	8	0
4,000	....	5,000	9	0
5,000	....	10,000	12	0
10,000	....	15,000	15	0
15,000	....	20,000	20	0
And if it exceed 20,000	....		25	0

* (458. *n.*) For other provisions it is necessary to refer to the Schedule of the Act, Part 1. Art. Conveyance; the points here noticed having been selected, as of principal importance from many others.

[(*a*) The instrument may be made a security not only for the principal sum and interest, but also for the costs and expenses which the mortgagee may incur in order to obtain the full benefit of his mortgage,—as, for instance, the expenses of a sale under a power of sale, or even the payment of rates and taxes upon the premises; without incurring the necessity of an increased *ad valorem* duty. *Pruessing* v. *Ing*, 4 B. & Ald. 204; *Doe* v. *Snaith*, 8 Bing. 146; *Doe* v. *Bragg*, 8 Ad. & Ell. 620.]

(460.) And the same duty of 25*l.* is imposed on a Mortgage made for securing a growing debt or floating balance, unless the amount to be ultimately recovered is limited (*a*) not to exceed a certain sum; for then that sum is the criterion of the duty. But sums to be advanced by the Mortgagee for Insurance of the Property against Fire*, are excepted, and may be stipulated to be added to the principal without incurring any additional duty. (461.) A Conveyance of Property to Trustees for Sale, if intended only for a security, must have the same Stamp as a

See Williams *v.* Rawlinson, 3 Bing. 71.

* (460. *n.*) There is another exception of sums to be advanced for the "Insurance of any Life or Lives pursuant "to any Agreement in any Deed, whereby any Annuity "shall be granted or secured for such life or lives." This seems to refer to Instruments not primarily purporting a (233.) Mortgage, but the Grant of an Annuity; where the security given for sums to be advanced for the purpose of Insurance, would continue such a charge of those sums as, but for the exception, would require a Mortgage Stamp. But it is not very usual on the Grant of a Life Annuity to make any stipulation as to Insurance, and therefore this exceptive clause is of little service. A more appropriate clause in the same part of the Act would have been one that related to Insurance upon the life of a Mortgagor who should be only Tenant for Life of the mortgaged property; but this has been omitted.

[(*a*) Where any thing beyond the principal sum due, and such costs and expenses as are mentioned in the last note, is intended to be secured, a precise sum should be limited in the mortgage deed. *Dickson* v. *Cass,* 8 Bing. 343; *Halse* v. *Peters,* 2 B. & Ad. 807. In the last case, it seems to have been considered that a precise sum must be limited in the deed, in order to prevent the duty of £25 attaching, even though

Mortgage; unless it be for the benefit of * Creditors generally, or of more than five specified Creditors, or be accepted by a smaller number in full satisfaction of their debts. (462.) The same additional duty in respect of length is
(154.) applicable to Mortgage as to Purchase Deeds. And it is provided that where the security is effected by several Instruments at the same time, if the *Ad Valorem* Duty exceed 2*l.* only one of them shall be charged with it, and the rest according to their † description and length; but the Stamps affixed to them shall denote the payment of the *Ad Valorem* Duty. (463.) From the *Ad Valorem* Duty on Mortgages, those Instruments are also exempted, which are given by the same party as a further security for any sum which he has already secured by a Mort-

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* (461. *n.*) And this exception applies, although a preference or priority of payment be given to two or three of the Creditors. *Coates* v. *Perry*, 3 B. & B. 48.

[See Wood *v.* Norton, 9 B. & C. 885.] † (462. *n.*) A *Bond* given on this occasion, (not amounting to 2,160 words,) is charged wtih a duty of 1*l.* only.

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the duty actually paid exceed what is necessary for the sum advanced, and may prove eventually large enough to cover all. But this seems very doubtful. In *Paddon* v. *Bartlett*, 2 Ad. & Ell. 9, the onus of proving the insufficiency of the stamp in such a case, was thrown upon the party disputing the validity of the Deed. And see too what is said of *Halse* v. *Peters*, in 8 Ad. & Ell. 623. The prudent course will be to insert a limiting sum in every case when the instrument is intended to be a security for an unascertained amount, unless in cases falling within the doctrine in 459, n.]

gage charged with that duty; and by Stat. 3 G. 4, c. 117, s. 3, the exemption is extended to all instruments without restriction, which are given as a further security for money already secured by a * Bond, on which a similar *Ad Valorem* Duty has been paid; but in either case, if any further sum be added to the principal, a new duty must be paid in respect of the addition (*a*). (464.) Re-conveyance on Redemption of a Mortgage requires only the ordinary Deed Stamp; and so, (by the same Statute, s. 2,) the transfer of a Mortgage, unless in respect of a further principal sum added to the debt (*b*).

(465.) If the Stamp be of a sufficient amount, and be not marked with the name of another kind of Instrument than that to which it is affixed, it will be sufficient, though it be not of the proper denomination. (466.) And it seems

1 Phil. Ev. 512.

Doe *v.* Whittingham, 4 Tau. 20.

* (463. *n.*) It is to be regretted that this Statute does not, in terms at least, extend the generality of its exemption, (without regard to the identity of the person giving the second security,) to the cases more restrictively privileged by the former act.

[(*a*) But an ordinary deed stamp also will still be necessary, in respect of the further security for the original sum; at least in a case not under St. 3 Geo. 4, c. 117, s. 3: and also, it would seem, in a case under that provision. See *Lant* v. *Peace*, 8 Ad. & Ell. 248.]

[(*b*) But where a further sum is advanced, no duty is payable in respect of the transfer, but only the *ad valorem* duty on the further advance. *Doe* v. *Gray*, 3 Ad. & Ell. 89, and see 8 Ad. & Ell. 254.]

that, on payment of the penalty as well as duty, the Stamp now in use may be affixed to a Deed made before the 55 Geo. 3, and will make it good. For the old Stamps cannot be had at the Office; a fact which may be thought also to afford some additional security against the forgery of Deeds of an early date.

(467.) Where, as is sometimes the case, upon a Sale, the Purchase Money, or part of it, is secured by a Mortgage of the same property to the Vendor, this compound transaction is subject to both the above kinds of *Ad Valorem* Duty. (468.) And where a Deed is made as a Security for the payment, to different persons, of separate and distinct sums of money, there must be a separate Duty for each sum.

(469.) Wills, so far as they relate to Real Property, require no Stamp; but in respect of any Personal Property which they comprise, the Copy authenticated by the Seal of the Ecclesiastical Court, (which is called the Probate, and is the proper evidence of the Will so far as Personal Property is concerned,) is subject to a Stamp Duty of considerable amount.

See Chap. 5. s. 3.

(470.) It happens for the most part, that Wills relating to Real Property comprise Personal Property also, and therefore require to be proved in an Ecclesiastical Court. The consequence is, that the originals remain in the custody of that Court, and must be produced thence whenever their dispositions concerning Realty come in question in a Court of Law or

Equity. (471.) For, by the general rule of Law, neither of a Deed nor of a Will, (existing elsewhere than in the hands of the adversary himself, against whom it is sought to be enforced,) is the Copy admissible evidence. Bac. Ab. 644.

(472.) There is one exception, however, to this rule, in the case of a Bargain and Sale; which, being a Deed recorded, is said so have had formerly by usage, and now has by the express Enactment of St. 10 Ann, c. 18, s. 3, the like privilege with Records properly so called, that a Copy may be * produced as evidence. The Copy of a Bargain and Sale for this purpose must be taken, not from the original Deed, but from the Inrolment; it must be examined with the Inrolment, and signed by the proper Officer, (whence it is called an Office Copy,) and must be proved upon oath to be a true Copy so examined and signed. This is

Smartle *v.* Williams, 1 Salk. 280; 14 East, 231.

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* (472. *n.*) The Statute makes the Copy of the same force *when pleaded*, and thereupon exhibited tot he Court, as the Original. But as this excludes all inquiry into the fact of execution, (for when a Bargain and Sale is pleaded, and the original produced with the certificate of Inrolment indorsed, the authenticity of it cannot be denied,) it would be absurd to suppose that the Authors of the Statute did not also intend that the Copy should be conclusive evidence when produced before a Jury. It is remarkable that these Office Copies have been represented by high authority as not requiring any proof of having been examined with the Roll. See *Appleton* v. *Lord Braybrook*, 6 M. & S. 34. As to the mode of examination in general, see *Rolf* v. *Dart*, 2 Tau. 52, 1 Phill. Ev. 388. (146. 147.)

the principal advantage which attends the Conveyance by Bargain and Sale.

See 6 V. J. 460. (473.) It has been regretted by a very competent judge, that some provision has *not been made for authenticating copies of other private documents; the want of which often seriously affects the title to an Estate. (474.) For no man, in the absence of direct stipulation, can be compelled (at least in a Court of *Law*) to produce his own Title Deeds for the benefit of another claiming or holding other lands by the same Title. (475.) And therefore it is usual upon the sale of an estate in lots or parcels, for the person who keeps the Title Deeds, (who is in general the owner of the lot of greatest value,) to covenant for himself, his heirs and assigns,

Pickering v. Noyes, 1 B. & C. 262.

Sugd. Vend. 449.

* (473. *n.*) It appears that by the Common Law any Deed may be inrolled upon the acknowledgment of a person who is a party to it; after which he cannot deny the execution (Bull. N. P. 256): but still the original must be produced (Bro. Ab. Faits. Enr. 4; 5 Co. 74. b.): and though from the report of *Smartle* v. *Williams*, in 3 Lev. 387, it appears that in that Case a Copy of the Inrolment of a Deed, (not being a Bargain and Sale,) was allowed as evidence, yet it should be observed that the Original was in all probability in the hands of the opposite party in the Action; upon proof of which, if he had been regularly called upon to produce it, and refused, secondary evidence became admissible. (1 Phill. Ev. 442.) See, however, *Lynch* v. *Clerke*, (3 Salk. 154,) where it is again stated broadly by Holt, C. J. that the Copy of a Deed Inrolled is evidence. In *Shore* v. *Collett*, (Coop. 234,) the *Counterpart* of a Lease was inrolled by the *Lessor;* which could not on any principle be effectual.

with every other purchaser or owner, his heirs and assigns, for the production of the documents on proper occasions. Such a covenant for the most part, will *run with the lands; i. e.* the obligation of it on the one side, and the benefit (to be enforced by Action) on the other, will attach upon all future owners of the same property. [580 &c.] (476.) The right to Title Deeds, like that to other personal property when in actual possession, may be transferred either by Deed, or by Delivery made with that intention; but in the absence of such acts, it in general accompanies the right to the Land, or to any parcel of the land, however small, which is retained by the owner of the Deeds. 6 Tau. 14; 1 B. & C. 37; Philips *v.* Robinson, 4 Bing. 196; Yea *v.* Field, 2 T. R. 708.

(477.) When an instrument is proved to be destroyed or lost, it follows of necessity that *secondary evidence* of its contents may be admitted; and the best secondary evidence is a Copy which some credible person swears to have collated or examined with the original. Hence it is usual to make out copies with the names of witnesses subscribed; and for private purposes such *Attested Copies* are commonly, in the absence of originals, required, and to a certain degree relied on. 2 Bac. Ab. 644. But necessity may justify a confidence in plain copies, or even abstracts, of documents which are known to have perished; at least where they are of ancient date, and have been followed by possession, or where the names of the Witnesses to the execution of the originals appear. Bull. N. P. 254. (478.) Destruction, it is evident,

See 1 Phill. Ev. 455. 457.

may be proved by direct testimony; but the proof of loss can go no further than a diligent search for what is first proved to have been once in existence: and as to the requisite degree of diligence no general rule can be laid down, except that it must increase with the importance of the Document.

Brewster v. Sewell, 3 B. & A. 296.

Fitzgerald v. Eustace, Gilb. Ev. 100; Marchioness of Annandale v. Harris, 2 P. Wms. 432; Burnett v. Lynch, 5 B. & C. 589.

(478.) The Recital, or Statement of the effect or contents of any instrument, in a subsequent deed, is sufficient proof, (for some purposes at least,) of the original *existence* of the former, against all parties who executed the latter, and those who derive their claims from them.

Dillon v. Crawly, 12 Mod. 500. But see Call v. Dunning, 4 East, 53.

(479). And it appears that if the recited Instrument is produced in Court, the recital will be admitted as evidence of its execution, at least if the absence of witnesses be satisfactorily explained.

1 Stark. Ev. 369.

(480.) But in no case, it is conceived, can the Recital of an Instrument which is not produced be evidence of its contents or effect, beyond what its name and nature necessarily imply, unless there be also proof of its loss.

Ford v. Lord Grey, 6 Mod. 44; 1 Salk. 285.

(481.) In the case of a Lease and Release, the recital of the former in the latter has been held sufficient of itself for establishing the conveyance against the Releasor, and all who claim under him; which may be attributed to the simplicity, formality, and merely relative effect of the recited Instrument. But even here, if the rights of a Stranger can be affected, the loss of the Deed of Lease must, as against him, be proved; and then the Recital may be good se-

condary evidence, as being authenticated by the admission of the Releasor, who was the party most concerned (*a*).

(482.) Of Records it will be necessary here to mention Acts of Parliament, Patents, Fines, and Recoveries.

Acts of Parliament of a local or private nature do not, (unless they contain a clause declaring them to be Public Acts,) constitute any part of those laws of the realm which all men are bound to be acquainted with; and, if contrary to reason, or grounded on a false statement or recital in the Preamble, they have been held to be void: but in general they are incontrovertible evidences of private right between the parties who are included in their provisions, and their representatives. (483.) The rights of Strangers are always saved by a clause inserted for that purpose; though if it sufficiently appeared who the Parties were, this Saving would be implied. Nor are strangers affected by any Recital or assertion contained in such Acts; nor, in matters beyond the scope of the enactment, are even the parties concluded by an erroneous recital of the effect of an Instrument. (484.) The proper evidence of a Private Act is a Copy examined with the Parliament Roll. A printed Copy unsworn is not generally admissible in any Court unless

4 Co. 13. a.; Plowd. 400, a.

8 Co. 138. a.

12 Mod. 384; 2 Ves. 480; Chapman *v.* Brown, 3 Burr. 1626.

1 Phil. Ev. 335.

[(*a*) In Ireland, by express enactment, the recital of the Lease in the Release, is, in all cases, sufficient evidence. See below, App. c. 1, s. 7.]

there be a provision in the Act for that purpose. (485.) By Stat. 33 Geo. 3, c. 13, Private as well as Public Acts commence their operation, (unless it be otherwise provided,) from the time of the Royal Assent being given, which is indorsed upon the Roll, and forms part of the Act.

(486.) Letters Patent under the Great Seal are the ordinary instruments for the Conveyance of Crown Property(*a*). These, being always inrolled, are matters of Record; and by Stat. 3 and 4 Edw. 6, c. 4, explained by Stat. 13 El. c. 6, an Exemplification (*i. e.* a certificated transcript) of the Inrolment, under the Great Seal, is of the same force and effect as the original Patent.

5 Co. 53. b; Co. Lit. 225. a.

(487.) The most appropriate Evidence of a Fine is the *Indentures*, which are made out by an Officer of the Court, called the Chirographer, and delivered to the parties. This is what is meant by the Ingrossing of the Fine, and seems necessary, though not to its completion, as a Fine at Common Law, yet to its being proclaimed according to the Statute. And accordingly, though the Indentures are in themselves

F.N.B. 147. a.; 5 Co. 39. b; Co. Read Fi. 1.

(77.)

[(*a*) By St. 10 G. 4, c. 50, the Commissioners of her Majesty's Woods, Forests, and Land Revenues are empowered, under warrant from the Treasury, to lease the Crown Lands for 31, and, in certain cases, for 99 years; and also to sell or exchange them (except the royal forests and parks.) All deeds of conveyance, &c., are to be enrolled as therein directed, and a memorandum of enrolment on the deed, signed by the proper officer, is evidence of its execution.]

sufficient evidence of the Fine, an indorsement on them, by the Chirographer, of the Proclamations being regularly made, is not so; but must be sworn to have been examined with the Roll; for the Chirographer's authority does not extend to the Proclamations. (488.) It seems that a Fine may at any time be exemplified under the Seal of the Court, which * Exemplification is of higher credit than a sworn copy; and, like the Indentures, is perpetual and independent of other proof. (489.) But the more usual substitute for the Indentures is a (*a*) copy examined with the Roll, which, being proved by the examiner's oath, is also good evidence. The (*a*) Office extracts, which are commonly supplied for the satisfaction of Purchasers, cannot be given in evidence; for it is a general rule that the whole of a Record must be exhibited.

Bull.N.P.229; 6 Tau. 486.

Reg.Gen. Mic. 1654, in Wils. Fi. & Rec.377.

Bull.N.P.228; Appleton *v.* Ld.Braybrook, 6 M. & S. 34.

Lynch *v.* Clerke, 3 Salk. 154.

Bull.N.P.228.

(490.) The best evidence of a Common Recovery, or of any other Judgment, is an Exemplification; but a (*a*) copy examined with the Roll is also admissible.

(491.) Notwithstanding the great solemnity attributed to Assurances by Matter of Record, it appears, from the frequent Applications to

* (488. *n.*) Fines and Recoveries in Wales and the Counties Palatine may be exemplified under the Seals of their respective Courts, by St. 27 El. c. 9, s. 8.

[(*a*) St. 3 & 4 W. 4, c. 74, s. 13, provides for the custody of the Records of Fines and Recoveries; and for the making and obtaining of Searches, Extracts, and Copies.]

the Court of Common Pleas for the *Amendment* of Fines and Recoveries, that they are much more liable to inaccuracies than any private writings; insomuch that the Deeds which commonly precede or follow these assurances serve, not only to direct their operation, but to correct their errors. (492.) No amendment can be made in the description of the property in a Fine or Recovery, otherwise than in consistency with the right construction of the Deed; but sometimes new descriptions of property, (as Wood, Meadow, Pasture, an Advowson, &c.) or an increased number of acres, and new names of places or Vills, have been inserted on the faith of mere general words in the Deed, (as of *all* the party's *hereditaments*, &c.) joined with the particular Affidavit of the Conusor or Recoveree himself. And so, a mistake in the name of the Vill, which occurred also in the Deed, but accompanied there with matter sufficient for its correction, has been amended. (493.) And it is clear that where the property is sufficiently ascertained by the Deed, the amendment may be made after the death of the Conusor or Recoveree, and even in opposition to the claims of his heir. But affidavits must be made of such facts as may satisfy the Court as to the intention of the Parties; for which purpose it seems to be indispensable that such a possession should have followed the transaction, as the amended Assurance would have given; and the absence of property to which an actual description in the Assurance

6 Tau. 73. (84, 85, 169, 170.)

1 H. Bl. 73; 1 Bing. 425; 6 Tau. 145.

1 Bing. 22. 4 Tau. 734.

2 Bing. 93.

Lambe *v.* Reaston, 5 Tau. 207: Gill *v.* Yeates & Ux. 4 Tau. 708. [7 Bing. 455, 8 Bing. 10.]

2 Bing. 93.

2 Bing. 386.

could relate, is a cogent additional argument for alteration. (494.) It appears also that additions may be made in pursuance of a more general description in the Deed, if the affidavits be such as fully to prove that the property in question was in the possession of the Conusor or Recoveree at the time of the Assurance, and has ever since been enjoyed, as if it had been comprised in it. (495.) Amendments have also been made in the names of the Parties; but for this, at least as far as regards the Conusor or Recoveree, there should be very full evidence of identity and mistake (*a*). (496.) The *Term* of which a Fine or Recovery is entered cannot be altered; for this, instead of amending the Assurance, would be to make a new one. (497.) The same may in general be said of altering the name of the County; which, however, has been allowed where there was a great resemblance, as between the County of Southampton, and the County of the Town of Southampton; or where one parish extended into two counties (*b*).

3 Bing. 176.

2 B. & B. 105. & v. 2 Bl. Rep. 1202.

8 Tau. 20. 27. 556. 645; 2 B. & B. 98; 2 B. & P. 455; 1 B. & B. 15; [7 Bing. 455; 8 Bing. 10, 18.]

(112.)

2 Bl. Rep. 788.

(113.)

[6 Bing. 275.]

4 Tau. 855.

8 Tau. 87.

[(*a*) Parties may insist on having the indentures of a Fine made to agree with the concord, by the insertion of all limitations of legal estates specified in the concord, *Butt* Demandant, *Noel* Deforciant. 7 Bing. 338.]

[(*b*) By St. 3 & 4 W. 4, c. 74, ss. 7, 8, it is enacted, that if it shall be apparent from the deed declaring the uses of a Fine, or making the Tenant to the writ of Entry in a Recovery, that there is in the Indenture, Exemplification, Record, or any of the proceedings of such Fine or Recovery any Error in the name of the Conusor or Conusee, Tenant, Demandant, or Vouchee, or any Misdescription or Omission

(498.) The Record of a true Recovery in an adversary Action, (other than an Ejectment,) when pleaded between the same Parties, or those who derive their claims from them, in an Action of no higher form, is conclusive upon the point which the Record shows to have been decided; though it seems that if not pleaded,
1 Phill. Ev. 320. but exhibited to the Jury as Evidence, they are not absolutely bound by it. (499.) The Record of a Verdict not followed by Judgment, or if the Verdict were taken in aid of a Court of
1 Phill. Ev. 389. Equity, by a Decree of that Court, cannot be produced as Evidence. (500.) And no exter-
7 Bac. Ab. 456. nal testimony can be given, to show on what point the Judgment turned.

(501.) All Judgments given in any of the King's Courts at Westminster, (except the House of Lords, the last resort of all appeals,) are liable to be reversed, upon a Writ of Error brought in a superior Court, for defects apparent on the Record. But Amendments may be

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of lands intended to have been passed; then the Fine or Recovery without any amendment shall be as valid, and shall be held to have passed all the lands intended to have been passed thereby in the same manner, as if there had been no such Error, Misdescription, or Omission. And s. 9 saves the jurisdiction of any *Court to amend any Fine or Recovery, in cases not provided for by the Act.] [1 Bing. N. C. 355; 3 Bing. N. C. 297.]

[* By St. 1 W. 4, c. 70, s. 14, the Jurisdiction of the Courts of the County Palatine of Chester and of Wales, ceased; and, by s. 27, the power of amending Fines and Recoveries levied or suffered there, was transferred to the Court of C. P.] [9 Bing. 311.]

made even after the Writ of Error is brought. Richardson v. Mellish, 3 Bing. 346.
And by St. 23 Eliz. c. 3, s. 2, no Fine, Proclamations on a Fine, nor Common Recovery, can be reversed for false or incongruous language, rasure, interlining, &c. "or other want "of form in words, and not in matter of sub-"stance." (502.) Also, by St. 10 and 11 W. 3, c. 14, no Fine, Common Recovery, or Judgment, can be reversed, unless the Writ of Error be brought within twenty years after the Fine levied, Recovery suffered, or Judgment entered of Record; or in case of the legal disability of any person to whom the right of bringing the Writ of Error shall accrue within the twenty years, then within five years after the disability removed.

(503.) The authenticity and verbal contents of an Instrument being ascertained, it is necessary to advert next to the general rules for its construction or interpretation.

And first, as to Deeds. Here the first great leading rule is, that the intention of the parties Touchst. 86.
is, if possible, to be supported: (504.) and Bac. Tr. 99; Touchst. 87.
the second, that this intention is to be ascertained by the Deed itself, that is, from all parts of it taken together. (505.) This second rule, though directive of the application of the first, is yet, in some degree, subordinate to it. For if the circumstances are such that a Deed can have no effect at all in that mode of operation which the ordinary meaning of its words suggests, it will be allowed to operate in another

mode rather than be quite ineffectual. Thus, if a person having a Power of Appointment, but no Estate, use the language of Conveyance appropriated to the transfer of Estates, it shall be deemed an exercise of his Power. (506.) Circumstances, not appearing in the Deed, may also negative or rebut an implication of Law, such as a Resulting Use. (507.) And if, in the application of the Deed to the circumstances, an ambiguity be made apparent which was not manifest on the face of the instrument, (as where two persons or things are known by the same name,) a further inquiry into circumstances may be made in order to remove it. (508.) But in general no expression can be contradicted or explained by extrinsic evidence; and the intention collected *from the four corners* of the Deed is to govern* the construc-

Sir E. Clere's Case, 6 Co. 18.

1 Sand. Us. 100. 107.

1 Phill. Ev. 537.

* (509.) So as even to justify the transposition of words, (Co. Litt. 217. b.; Touchst. 86,) and often to deviate from the strict grammatical sense. Thus, it is not always necessary that two negatives should make an affirmative; (Touchst. 87;) the word "same," though properly referring always to the last antecedent, (Co. Litt. 20. b.) may, to avoid a contradiction, be differently applied. Cro. Jac. 662. (510.) And in conditions or expressions of contingency, "*A. and B. or C.*" may be taken to mean "*A.* "*or B. or C.,*" if required by the intention; (Co. Litt. 225 a.; Cro. Eliz. 270;) but it is not a universal rule that a disjunctive particle in the end of a period shall make all the preceding members of it disjunctive. 3 Atk. 391. It seems indeed that these conjunctive and disjunctive particles may either retain or exchange their proper

tion of every passage; unless by virtue of some technical rule, it have a peculiar meaning, from which the intention itself must be principally inferred. (511.) A third general rule, subservient to the two former, is, that ambiguous words shall be construed most favourably to the Grantee or person intended to be benefited. The same principle is perhaps a little differently enunciated in the maxim, often applied to Deeds, (though more significantly, it may be thought, to Pleadings,) "that words are to be "taken most strongly against him who utters "them." For though a distinction has been taken in this respect between a Deed Poll and an Indenture—because in the latter every word is to be attributed to all parties, as proceeding from their mutual assent or concurrence, while in the former there is but one party to whom they can be attributed—yet it is certain that the rule, as first stated, is applicable to Indentures; and if every ambiguous word in a deed Poll is to be taken most strongly against the party who executed the Deed, the rational ground for such a construction is, that the fullest benefit of the Deed is thus made to accrue to those for whose benefit it was made. (512.) A fourth rule is, that if two expressions be utterly irre-

Bac. Tr. 42.

Plowd. 134. a. (140.*n*.439.)

Bullen *v.* Denning, 5 B. & C. 842.

Touchst. 88.

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significations, according to the apparent intention. See *Wright* v. *Kemp*, 3 T. R. 470; and see further, 6 T. R. 34; *Doe* v. *Jessop*, 12 East. 288; *Hasker* v. *Sutton*, 1 Bing. 500.

concileable, that which is first shall stand, and the other be rejected. The reason of this seems to be, that as Deeds are made after due deliberation, that which is principally intended by the parties may be expected to occur in the first place.

(513.) These Rules will be better understood if we consider the formal * parts into which Deeds of Conveyance are commonly divided. In the first place, (at least in Indentures,) the date is set down, and all the parties are named. Then come the Recitals, if any, which serve to explain the operation and objects of the Deed. The operative part follows; expressing, first, the Consideration; then the act of conveying, (in which the names of the Grantors and Grantees again occur, with the appropriate verbs of transfer;) then the description of the Tenements or Parcels, with general words com-

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* (514.) These parts constitute obvious divisions in the Deed; but in general the writing is without punctuation, and such stops must be supplied by the reader as will give effect to the whole. 4 T. R. 65, 66. And though marks of parenthesis are often inserted, it seems that they are not to be regarded as diminishing the effect of the words included between them. 3 Atk. 9, 10. The same rule is applicable to Wills. 1 Meriv. 651.

The Reader will find Precedents of Deeds of Conveyance at the end of some of the ordinary Text Books on Real Property. And for a pretty full collection of them in a small compass, with the advantage of an analytical and synthetical arrangement, he is referred to Mr. Stewart's "Practice of Conveyancing."

prising their appendages and guarding against omission or inadequate construction; then the Habendum, (beginning with the words, "To "have and to hold,") which contains the precise words of limitation of the Grantee's estate; then the Declaration of Uses, which may be considered as a new kind of Habendum introduced by the Statute; then the Declaration of Trusts, if any, which are intended to be of Equitable jurisdiction; and lastly, the Covenants relating to the Title. And the whole Deed closes with a brief form of words connecting its contents with the signatures and seals of the parties, and those with the date.

See 5 B. & C. 719.

(515.) The Habendum, it is obvious, cannot be requisite in those Deeds which operate merely by Declaration of Use, as an Appointment, a Covenant to stand seised, or a Bargain and Sale; though it commonly occurs in the latter. Nor in a Common Law Conveyance is it absolutely necessary, though the Deed would be very informal without it, as it is a Clause of great importance. (516.) All the parts of the Deed which precede the Habendum, taken together, are called the Premises; of which, it is said, "the office is rightly to name the Grantor "and Grantee, and to comprehend the certainty "of the thing granted." (517.) But though the Grantee should be first named, as such, in the Habendum, the Grant to him will yet be

(136. 172.)

[Doe v. Williams, 5 B. & Ad. 783.]

Touchst. 75; Co. Litt. 7. a.

Co. Litt. 26. b. & n.

good, provided there was not* another Grantee named in the Premises; (518.) or if there were, provided the estate given by the Habendum to the new Grantee was not immediate, but by way of remainder. Indeed, where several parties are to take successively by way of remainder at Common Law, it seems most correct to name only the first taker as Grantee in the Premises. (519.) Words of limitation, (especially if the estate be fee simple,) are frequently inserted in the Premises and afterwards repeated in their proper place, the Habendum. And this redundancy has sometimes been serviceable; for it

2Sand.Us 314. is a rule that if the Habendum be void, (as, if

(22.) it defer the vesting of the first Estate of Freehold to a future day,) the Grantee will not take an immediate estate for life by implication, where no estate is †expressed in the Premises; because a contrary intention appears; but where

Goodtitle v. Gibbs, 5 B. & C. 709. the Deed contains two express †limitations, one of which is void, or without some further ceremony inoperative, there the other shall have that immediate effect of which it is capable. (521.) If there be two repugnant or contradictory li-

(511.) mitations, then that which is most for the

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* (517 n.) And if another Grantee be named in the Premises by an evident mistake, his name may be rejected in construction. *Spyve* v. *Topham*, 3 East, 115.

† (520.) It should be observed that words of reference to what is expressed elsewhere may, if sufficiently precise, be considered as transferring the expression into their own place. Co. Litt. 9 b. 20 b.

advantage of the Grantee shall prevail; but if they be reconcileable, though dissimilar, (as if the estate be given in the premises to the Grantee and his heirs, but in the Habendum to him and the heirs *of his body*,) it seems that the Habendum, whose office it is to limit the estate, will explain or control what came before. Co. Litt. 21. a.

(522.) It happens not unfrequently, that a person having an Estate and also a Power, conveys the land by a combination of words which is applicable indiscriminately to both, such as " direct, limit, appoint, grant and release;" and then a question may arise, whether the Deed operated as a Conveyance at Common Law, or as an appointment of the Use. If such a Conveyance be made to the Use of the same person who is Grantee in the Premises and Habendum, and with the same limitation of estate, it might be thought indifferent whether he takes the property by the one mode of Assurance or by the other. But it appears that, if he takes as Appointee, he may escape the obligation of Covenants entered into by his Grantor since or at the time of the creation of the power, and which if the selfsame estate enjoyed by that Grantor were transferred, instead of a new estate arising by way of Springing Use under his Power, would run with the land. We have seen also that the Dower of the Grantor's wife may thus be avoided. (523.) And it seems that in these cases, if the intention be not

Roach v. Wadham, 6 East, 289.

(172, 475.)

(356.)

[And see 176, n.]

otherwise manifested in the Deed, there is either an election given to the Grantee to be exercised by him or his representatives when they will, or, (which seems a more certain and satisfactory mode of attaining the same end,) that construction is at all events to be made, which is most for the Grantee's benefit. (524.) But if any use be declared after the Habendum to a person other than the Grantee, it will become a question which of these two persons takes the legal estate; since there is an Appointment, in the Premises and Habendum, to *A.* (which, like a
(151.) Bargain and Sale, directly, by the nature of its operation, gives him the Use,) and this is followed by a declaration of the Use to *B.* In such cases the intention upon the whole of the Deed is generally so plain, that no person would
(512.) think of applying the rule of priority, so as to convert the declared Uses into mere equitable interests, were it not that those old decisions, which are the only foundation of the distinction now universally admitted between Legal and Equitable Estates created by Declaration of Use, are themselves grounded upon an application of the rule no less unreasonable. And therefore, when the estate of the Grantor is adequate to the estate intended to be conveyed, or is not less sufficient for the purpose than the Power, the plain intention to create legal estates by the Declaration of Uses will cause the words of Appointment to be rejected in construction; but if they cannot be rejected, it should seem

Heyward's Case, 2 Co. 35.

Roach *v.* Wadham, *ubi supra.*

Cox *v.* Chamberlain, 4 V. J. 631; Wynne *v.* Griffith, 3 Bing. 179, and 5 B. & C. 923; Haggerston *v.* Hanbury, 5 B. & C. 101.

[1 Sugd. Pow. 451.]

that the Grantee named in the Premises must take the legal estate, according to the limitation contained in the Premises, if that be complete, or else according to that in the Habendum. It must be observed, however, that an inclination has been shown, by an extensive change in the arrangement of the clauses, to make such Deeds operate according to their evident intention. 5 B. & C. 947. (509.)

(525.) The Date mentioned in the Deed is not conclusive, even against the parties, unless perhaps it be made so by Inrolment; and if there be no date, or an impossible one, or if it be proved to be false, the Deed will take effect from the actual time of delivery. (526.) Yet where there is an express Date, though false, and reference is made in any part of the Deed to the * Date, for the computation of any period of time, this will be referred to the express Date, and not to the time of delivery. (528.) If the estate given by the Deed should, by the Habendum, be directed to commence *from the day of the date*, this, by the ancient strictness of construction, was taken to mean a commencement on the next day; and therefore, if the estate were freehold, to make the limitation void: but it is now settled that, in order to give effect to the Deed, these words must be

(449.) Hall v. Cazenove, 4 East, 477. 3 Bac. Ab. 164. Doe v. Day, 10 East. 427; Styles v. Wardle, 4 B. & C. 908. Pugh v. Duke of Leeds, Cowp. 720. (22. 519.)

* (527.) On the other hand, the words "henceforth," and "now," are properly referred to the time of delivery. *Steel* v. *Mart*, 4 B. & C. 272. See further, Co. Litt. 46. b.

understood as synonymous with "immediately "from the date."

Co. Litt. 3. Touchst. 233. 236; 8 Tau. 646; 3 Bac. Ab. 378; Gould *v.* Barnes, 3 Tau. 504; Croydon Hospital *v.* Farley, 6 Tau. 467; 2 Bac. Ab. 4.

(529.) Strict accuracy in naming the parties is not essential, if they be known by the names appearing in the Deed, or if a description be added which is sufficient to identify them. And this seems now to be the admitted rule, even in the case of a Corporation, which, without a name could have no existence.

5 Bac. Ab. 710.

(530.) Recitals, being clear indications of intention, may restrain the effect of general expressions contained in the operative part of a Deed (*a*): (531.) and the Recital of a particular fact has been held conclusive evidence of that fact between the parties to the Deed (*b*). It seems also that a person, who is not a party, may avail himself of such evidence against any of the executing parties. But as against Strangers such declarations cannot have the effect of legal evidence; though, if supported by subsequent possession, they may contribute much to the certainty of Title.

Rees *v.* Lloyd, Wightw. 123; 2 Prest. Conv. 305.

Doe *v.* Murless, 6 M. & S. 110.

1 Prest. Abstr. 44; 3 Id. 8.

1 Phil. Ev. 555.

(532.) If no particular Consideration appear in the Deed, or if it be stated, with the addition of such general words as afford an opening for inquiry, evidence may be given as to that which

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[(*a*) See accordingly, *Simons* v. *Johnson*, 3 B. & Ad. 175; *Lindo* v. *Lindo*, 1 Beavan, 496. And see *Doe* v. *Jeyes*, 1 B. & Ad. 593.]

[(*b*) See accordingly, *Lainson* v. *Tremere*, 1 A. &. E. 792; *Bowman* v. *Taylor*, 2 A. & E. 278. See too *Pearce* v. *Morrice*, 2 A. & E. 84; *Doe* v. *Ford*, 3 A & E. 649.]

is left indefinite. (533.) But as an express consideration cannot be denied, unless on the ground of fraud, usury, or other illegality, so it seems that, where the statement is definite in all its parts, no addition can be made to it. (534.) But it is no contradiction of the Deed to affirm that the consideration money there mentioned to be paid has been returned. (535.) It is usual, upon a Purchase or Mortgage, to indorse upon the Deed a Receipt for the consideration money, in addition to the acknowledgment contained in the body of the instrument. This indorsed Receipt, though perhaps more satisfactory on general principles than that which constitutes one formal part of a multifarious document, is not conclusive evidence of payment; while the latter, if, when taken in connexion with the rest of the Deed, it be sufficiently precise and categorical, has the effect of an Estoppel between the parties and their representatives. (536.) The absence of a Consideration, supposing that negative fact to be proved, does not of itself, without actual or constructive fraud, invalidate a Conveyance of real Property. (537.) Nor, where the consideration consists of some future or contingent benefit, does the failure of it operate as a Condition to defeat an estate once vested by the Deed. (538.) And so, where a fact is recited, as a marriage, which proves to be false, though the intention of the parties may have been

Homer v. Ashford, 3 Bing. 322.

Baker v. Dewey 1 B. & C. 704.

Rowntree v. Jacob, 2 Tau. 141; Lampon v. Corke, 5 B. & A. 606. [And see Bottrell, v. Summers, 2 Y. & J. 407; sed. qu.]

(147.)

4 East. 200. 2 B. & A. 554.

(221, &c. 225.)

[1533, &c.]

Co. Litt. 204. a.

Boughton v. Sandilands, 3 Tau. 342.

founded on the mistake, the Conveyance stands good (*a*).

(539.) The words of Conveyance are commonly set down first in the past tense, and then repeated in the present. This formality, (which is very immaterial,) is thought to have originated in an ancient practice of making Feoffments by Parol and Livery, and then confirming and substantiating them by Deed. (540.) In a Feoffment "Give and Enfeoff" are the most appropriate words. (541.) In a Lease and Release, the Lease is most properly made by the words "Bargain and Sell" only, that all possibility of question as to the mode of its operation may be excluded: (542.) but the Release has commonly a multitude of words, such as "Grant, Bargain, "Sell, Alien, Release and Confirm;" the variation of which according to circumstances is for the most part more a matter of taste than of importance: and where the Consideration is not pecuniary, the idle words "Bargain and Sell" are countenanced by the insertion of a nominal Consideration, as of ten shillings, acknowledged to be paid. (543.) The omission of the Grantor's name in this part of the Deed may be made good by evident intention, at least if it be an

Prest. Watk. Conv. 194 (20.)

2 Sand. Us. 50. (148)

Butl. Co. Litt. 384. a. n. 1, 1 B. & C. 700.

Trethewy *v.* Ellesdon, 2 Ventr 141.

[(*a*) But a Court of Equity will relieve the parties from the legal consequences, on a proper case of misapprehension and mistake being made out; as was done in the case of ***Boughton*** v. ***Sandilands,*** cited in the margin. See S. C. nom. ***Robinson*** v. ***Dickenson,*** 3 Russ. 399.]

Indenture between two persons only; and that of the Grantee may be supplied, as we have seen, by the Habendum. (517.)

(544.) The Description of the Parcels is of great importance. As to which it is evident in the first place, that nothing can be described but by some general denomination, applied to the individual subject by the addition of its proper name, or of some peculiar circumstances of Locality, Quantity, Quality, Possession, or Title. (424.)

(545.) Some of the general denominations of Real Property have already been explained, and others will be considered in the Chapter on Incorporeal Tenements. At present the following points seem to require notice. The word "Farm" is a good legal description for a Capital Messuage, (or principal Dwelling House,) and all the land belonging to or occupied with it.

(1,2,3,4,5.) Chap. 6. Plowd. 195; Co. Litt. 4. b. 5 a.; Touchst. 93.

(546.) A "Messuage," (at least if the words "with the appurtenances" be added,) includes the Dwelling House with its adjacent Buildings, the Garden, Orchard and Curtilage. A Toft is the Site of a House which has been pulled down.

[Plant v. James, 5 B. & Ad. 791; & 4 A. & E. 749; Hare v. Horton, 5 B. & Ad. 715.]

(547.) A Grant of the "Profit" of Land carries the land itself; but a Grant of the "Vesture" or "Herbage," it is said, gives an interest in the surface only.

See 2 B. & A. 730. *arg. contr.*

(548.) The land itself will pass, in a conveyance adequate to that purpose, by the name of a "Mine;" but the Grant may, it is conceived, contain an exception of so much of the surface as is not necessary for

E. of Cardigan, v. Armitage, 2 B. & C. 197.

Co. Litt. 48. b. the purposes of mining. (549.) So, an Upper Chamber may constitute a distinct Tenement. (550.) "Water" does not include the land on which it stands; unless perhaps in the case of Salt Pits or Springs, where the interest of each owner is measured by *Bullaries* or buckets of brine. (551.) By the name of Land, though apparently signifying Land in possession, a Reversion or Remainder will pass; but not Land in possession by the name of a Reversion or Remainder. (552.) If two persons join in a Grant of all their Lands, &c. it will comprise not only the joint property of both, but the several property of each; and so if one of them grant all his lands, his share of the joint-property will be included. (553.) But lands which he holds in trust for another may perhaps be considered as tacitly excepted*.

Co Litt. 4 b. 1 Sid. 161, 1 Lev. 114.

Touchst. 91. [Doe v. Joyes, 1 B. & Ad. 593.]

Touchst. 90.

1Sand.Us.361.

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* (553. n.) The Conveyance of a Bankrupt's property by the Commissioners is always in general terms, as is also the Power given to them by the Statute; but it has been held that property of which the Bankrupt is a mere trustee is not affected by the conveyance. 1 T. R. 622; 3 B. & P. 40; 1 M. & S. 526. But some(a) doubt seems now to be thrown upon this opinion, by s. 79 of the late Bankrupt Act, (6 G. 4, c. 16.) See, however, s. 135 of the same Act.

[See 242,n.]

[(a) The rule is the same since the statute, at least as to a bare trustee. *Exparte Gennys*, Mont. & M. 258. By the 79th section, the Court of Bankruptcy is empowered to order, upon petition of the party interested, a conveyance of the trust property to such person or persons as the Court shall think fit, on the same trusts. This order will be made

(554.) The comprehensiveness of general denominations may be limited by exceptions, or by qualifications. With respect to Exceptions, it is a general rule that they may be made by the same words as would constitute a sufficient description of the same thing in a Grant; (555.) and yet ambiguities must be construed favourably to the principal Grantee, and not to the Grantor for whose benefit the exception is made. (556.) And exceptions which prove to be co-extensive with the Grant, or which are made in any of its very words, are contradictory and void. (557.) Qualifications are sometimes implied. For it is a rule that if general words be preceded by a specification or enumeration of particulars, the general words will not be construed to signify any thing of a higher order or more importance than what is before expressed; (558.) but this effect of the enumeration may be countervailed by other words accompanying the general denominations, and giving them a peculiar emphasis. Thus the word Estate may be used to signify all kinds of property; but by the description of all the Grantor's "Plate, "Jewels, and other Estate," only his *personal*

Touchst. 100.

(511.) Hob. 170; Bullen *v.* Denning, 5 B. & C. 842. [Legh *v.* Heald, 1 B.&Ad. 622.]

Co. Litt. 47. a. [Hare *v.* Horton, 5 B. & Ad. 715.]

2 Co. 46. b.

6 Mod. 108; see Doe *v.* Buckner, 6 T. R. 610; Roe v. Yeud. 2 N. R. 214; Doe *v.* Rout, 7 Tau. 79; Henderson *v.* Farbridge, 1 Russ. 479; Doe *v.* Morgan, 6 B. & C. 512. [Doe *v.* Evans, 9 A. & E. 719.]

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without a reference to the Master as to the fitness of the new trustee, if the petition be supported by a sufficient affidavit of fitness. *Exparte Inkersole*, 2 G. & J. 230; *Exparte Beveridge*, 4 D. & Ch. 455. And the Court will appoint more than one new Trustee, if the circumstances of the Trust render such a course expedient. *Exparte Wilkinson*, 2 Deac. 151.]

property will pass; yet if it be other "estate "real and personal," then it is evident the word must be taken in its fullest extent.

Ewer v. Heyden; Cro. El. 476, 659.

(559.) And if a word having two senses, the one more, the other less general, be accompanied with words which entirely or in part supply the difference between those two senses, this is a reason for taking it in the less general sense; so that in a Grant of "Lands, Meadows,

(2.)

"and Pastures," the former word is held to mean only *arable* land.

(560.) Express Qualifications are taken from

(544.)

the circumstances of description above mentioned; and therefore it is very necessary to distinguish whether such circumstances are added by way of Qualification, or only of Demonstration. For which purpose it is a rule, that when once the description amounts to a

Dowtie's Case, 3 Co. 9. b.; Plowd. 191. b.; Hob. 171; Steele, D. &c. 6 Tau. 145.

certainty, such certainty at least as is afforded by the use of a proper name, any additional circumstance, if false, may be rejected. (561.) So also if the mistaken circumstance be preceded

Lambe v. Reaston, 5 Tau. 207.

and followed by other circumstances which, taken together, are sufficient to outweigh the error. (562.) But it has been held, that if the erroneous circumstance be placed first of all, the the thing misdescribed, even though it be the only subject of the Grant, will fail to be conveyed.

Roe v. Vernon, 5 East. 51, Hob. 171.

(563.) But if all the circumstances of description be true, (*i. e.* if there be some one subject to which they are all applicable,) and they be placed in a continuous sentence as if uttered in

one breath, it is difficult to construe them otherwise than as Qualifications: and therefore it has been held that a Grant of "the Manor of D. in D." passed only so much of the Manor as lay in the Vill of D., and not the other part of it which was situated in S. (564.) If however there be some break in the sentence, it is otherwise; as if, after a description amounting to a sufficient certainty, there be added, "all "which were lately in the occupation of A.;" this being a distinct proposition, though it should not be applicable to all the subjects included in the preceding description, yet is not necessarily restrictive. (565.) And so it is held that what comes after a "*videlicet*," or, "that "is to say," can neither enlarge nor restrain the preceding description, though it will explain it if ambiguous. (566.) The circumstance of quantity is not in general sufficient to restrain or limit a precedent certainty; but where from the want of other circumstances of description it has the effect of a qualification, it cannot, from its nature, amount to a demonstration also; as if a man grant twenty * acres of Land

Touchst. 99.

Swyft v. Eyre, Cro. Car. 546. [Doe v. Galloway, 5 B. & Ad. 43.]

Hob. 171-2.

Alexander, D. &c. 4 Tau. 734.

* (566. *n.*) The Statute Acre contains four thousand eight hundred and forty square Standard Yards, being one hundred and sixty square Perches, Poles, or Rods, or four Roods. The Furlong is two hundred and twenty yards in length, and the Pole or Perch five yards and a half. St. 5 G. 4, c. 74, s. 1 and 2. Therefore a strip of Land one furlong in length, and one Pole in breadth is one thousand two hundred and ten square yards, or a

2 Co. 36. a. Hob. 174.

in *W.*, where he has more than twenty acres; and therefore it is said the Grantee must make his election in what part of the land he will take the acres which are to become his property. This case seems to have always formed an exception to the rule which requires every conveyance of Freehold Estates to have an immediate operation. (567.) But a Grant of so many acres, (or so many trees,) as conveniently can be spared, is void; for the uncertainty cannot here be remedied by an election.

Galley *v.* Barrington, 2 Bing. 387.

(568.) In the Declaration of Uses, words of limitation, which were evidently omitted by mistake, have been supplied in construction by a somewhat strained application of subsequent words of limitation, which, if there had been no such exigency, would have seemed to relate entirely to other persons. (569.) But omissions cannot be supplied "from arbitrary conjecture, "though founded upon the highest degree of "probability." (570.) The construction of Powers is often attended with doubt and difficulty. It may here be observed that the

Chapman *v.* Brown, 3 Burr. 1626. See also 3 Atk. 136; Butl. Fearne, C.R. App. 572; Andree *v* Ward 1 Russ. 260; Id. 279.

Rood. But in some parts of the country these measures have been varied by Custom; and the quantities expressed in Deeds must be understood accordingly. Co. Litt. 5 b.; Touchst. 95; 6 Co. 67. a.; but see Cro. Eliz. 267, contr. And the 15th section of the late Statute, which directs that all contracts for works to be done, or for goods, wares, merchandise, *or other things* to be sold, &c. shall be regulated by the Standard Measures, is evidently not applic-
(557.) able to Conveyances of Land.

word "heirs" is not necessary for creating a Power to dispose of the fee, but it seems that some words expressive of the intention must be used. Thus a Power to appoint the Land "to "such persons" as *A*. shall choose, will, it is generally thought, only authorize him to give life-estates; but if it be "to such uses" or "for "such estates," &c. he may give the inheritance by using the word "heirs" in his instrument of Appointment. (571.) A Power to appoint to *Children* does not include Grandchildren (*a*); (572,) nor will it authorize an Appointment of the whole estate to one who is not the only child, or between a select number (*b*), unless

1 Sand. Us. 122; Sugd. Pow. 437, &c. 458.

Sugd. Pow. 501; Id. 481.

[(*a*) But Grandchildren may be included, if their parent, being an object of the power, and being *sui juris*, is a party to the deed of appointment. *Langstone* v. *Blackmore*, Ambl. 289; *Routledge* v. *Dorril*, 2 Ves. Jun. 357. And where such object is a married woman, if she and her husband are parties to the deed, and the appointment is by way of settlement on them and their children, and the settlement such as a Court of Equity would consider reasonable and proper, it will be supported. *White* v. *St. Barbe*, 1 V. & B. 399.]

[(*b*) And the Courts of Equity also held, that an appointment of a merely nominal or grossly unequal share to one object, so as to give the substantial benefit of the property to the others, was illusory, and therefore void. But the application of this rule being found to be attended with difficulty, St. 1 W. 4, c. 46, was passed, which enacts, that no appointment which shall be made in exercise of any power shall be invalid or impeached in Equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power.]

there be some further expression to show that a permission to exclude the rest was intended.

Sugd. Pow. 222; Dalby v. Pullen, 2 Bing. 144.

(573.) The right to exercise a Power is not in general to be considered as deferred or suspended, merely because the estate to be created by a present appointment cannot confer an immediate enjoyment of the land, or even amount to a vested interest in it.

(574.) The Covenants relating to the Title secure to the Grantee a pecuniary compensation for any damage he may suffer contrary to their stipulations. (575.) It is usual in Mortgages to covenant generally and absolutely that the Title is good, that if default shall be made in payment of the money the enjoyment of the property by the Mortgagee shall never be lawfully disturbed, and that all further Assurances that can reasonably be required shall be made at the Mortgagor's expense. (576.) But on Sales and Marriage Settlements, whatever defects in the Title may have originated previously to the last antecedent Conveyance in which such Covenants are contained, are left to be compensated by the Covenantor on that occasion, or his representatives; and the new Covenants amount* only to an engagement that the Title has not since been impaired by the holders of it;

Sugd. Vend. 451, &c.

* (576. *n.*) As to the qualifying words used for this purpose, and how far they are considered as extending to the several clauses of the Covenants, see 2 Sand, Us. 321; and Sugd. Vend. 553.

[Smith *v.* Compton, 3 B. & Ad. 189.]

and that there shall be no lawful disturbance by them or their representatives, who are also to make reasonable further Assurances at the expense of the Purchaser, or of the Settlor. (577.) When a Conveyance is made by Trustees, or with their concurrence, each of them covenants against the consequences of his own acts only. (578). In the Covenant for quiet enjoyment, if the kind of disturbance be not specified, yet no person is understood to make himself answerable for the future *unlawful* acts of any one whom he does not expressly name; but a Covenant against the acts of *A.*, (without saying "lawful" acts,) will extend to an *unlawful* disturbance by *A.*, whose person is thus pointedly distinguished. And though the engagement be expressly against *lawful* acts, yet any act of the Covenantor himself, which amounts to an assertion of Title, however groundless, will be a breach of the Covenant.

Nash v. Palmer, 5 M. & S. 374; Fowle v. Welsh, 1 B. & C. 29.

Sugd. Vend. 547.

(579.) Covenants in general, when broken, give to the Covenantee, and after his death to his executors or administrators, an action for damages against the Covenantor; or if he be dead, against his executors or administrators to the extent of his personal property in their hands; and if the Covenant were "for him and "his heirs," (as indeed is the constant practice,) then also against his heir, so far as the value of any Real Property which has descended to him in fee simple may suffice. (580.) But the benefit of Covenants relating to a future con- (574.)

F.N.B. 145. C. veyance of land in fee simple to be made to the Covenantee, will descend to his heir. (581.) And if the Covenants relate * to Land of which the Covenantee is already seised, or becomes seised in the instant, and be made expressly, "to him, "his heirs, and assigns," or even, "to him and "his heirs," the benefit of them will run with the land, so as to give the remedy to the heir or grantee of the Covenantee, and so on for ever. (582.) Still however the remedy is only against the Covenantor and his heirs, executors or administrators personally, and must fail of effect when his property is dissipated. But if the Covenants constitute an arrangement of rights between the proprietors of different tenements, and thus relate also to lands of the *Covenantor*, the *obligation* of them may then also be made to run with those lands, and thus the benefit becomes perpetual. Of such a na-

Co. Litt. 385. a.; 5 Co. 17. b. See Kingdon *v.* Nottle, 4 M. & S. 53; Jones *v.* King. Id. 188; 2 B. & P. 568. n.

(53.) * (581. *n.*) It has been said, (3 T. R. 402, and see 3 Wils. 29,) that "it is not sufficient that a Covenant is "concerning the land, but, in order to make it run with "the land, there must be a privity of estate between the "covenanting parties." But there seems no reason to understand this more largely than as it was applicable to the case before the court, *viz.* that of a Lease, in which the Lessee covenanted with a third party who joined with the Lessor in ostensibly demising, but had no legal estate in the land. If this Covenantee had possessed any estate, the lease would have created a privity of estate between him and the Covenantor as his Lessee; and therefore it was the same thing whether the Court required privity of estate between the parties, or only an actual estate in the Covenantee.

ture are the (*a*) Covenants for the production of Title Deeds already mentioned: nor does there appear to be any difference in principle whether the Vendor retains the Deeds and enters into a Covenant with the Purchaser; or the latter takes them, and covenants with the Vendor, or with another Purchaser, for their production; nor whether the Covenants are entered into at the time of the Conveyance or afterwards. (475.)

Sugd. Vend. 542; Barclay, *v.* Raine, 1 S. & S. 452, *contr. sed qu.*; [Fain *v.* Ayers, 2 S. & S. 533.]

(583.) There can be little doubt also that the Assignee of any *part* of the Covenantee's lands, to which the Covenant relates, is entitled to his share of its benefits: (584.) and it seems equally clear that the obligation attaches to every part of the Covenantor's lands, though afterwards severed from the rest, as far as such part is concerned in the engagement. (585.) Nor is it necessary that the land should continue to be held in fee simple. And therefore in a Conveyance to Uses, it is usual to make the Covenants to the original Grantee, named in the Habendum, his heirs and assigns; for all the persons to whom uses are declared, which by the Statute are converted into legal estates, are for this purpose considered as Assigns of the Grantee, though no one of them takes the whole

Co. Litt. 385. a.; Sugd. Vend. 460, Twynam, *v.* Pickard, 2 B. & A. 105; [Curtis *v.* Spitty, 1 Bing. N. C. 756.]

3 Wils. 29; 5 B. & C. 483-4.

5 Co. 17. b.

Sugd. Vend. 541. n.

[(*a*) See the subject of Covenants for Production of Title Deeds, and the legal and equitable remedies under them, fully discussed in 2 Sugd. V. & P. pp. 123—131; and, generally, as to what Covenants run with the land, Ib. pp. 456—508.]

fee simple; and in no other way can the benefit of the Covenants in an Indenture be made to extend to persons in remainder who are not parties to the Deed; for it cannot run with the Land beyond the extent of the Covenantee's estate.

(586.) These Covenants, upon which pecuniary satisfaction can be obtained in a Personal Action, by Writ of Covenant, have now almost entirely superseded the use of (a) *Warranties* in Deeds; which, however, are still regularly inserted in Fines. (587.) Of these it may be observed, that the word "Give" in a Feoffment in fee, or Lease for life, contains an implied Warranty during the Life of the Feoffor or Lessee; and in the latter case the obligation may be created without Deed, and runs with the reversion; (588.) but, except in the cases of Exchange and Partition already mentioned, no Warranty can be created which shall perpetually bind the * heirs of the Feoffor, without express words to that effect, nor without the very word "warrantizo," or "warrant." (589.) And an

Wils. Fi. 62. Litt. 729.

Co. Litt. 384. a.

F. N. B. 133. G.; 4 Co. 81. a.

(64. 319.)

* (588. *n.*) The obligation of a perpetual express Warranty descends continually to the heir of the person who made it, as a thing of which there can be no seisin; and to the heir at common law, although the lands be subject to a customary descent. Litt. s. 737, &c.; Co. Litt. 12. a.

(303, 304.) (308, 313, 314.)

[(a) By St. 3 & 4 W. 4, c. 27, s. 39, no warranty made after the 31st of December, 1833, shall defeat any right of entry or action for the recovery of land.]

Assignee cannot take the benefit of an *implied* Warranty, except by way of Rebutter or Estoppel to a Demandant who is obliged by it. (590.) Also upon the implied Warranty in an Exchange or Partition, the Recompence in Value to be sought by Voucher can proceed only out of those lands which were reciprocally given or allotted, and in them the obligation is inherent: (591.) but upon other Warranties all the Lands of the Warrantor are liable to be affected by the Voucher; and this liability may be fixed upon them, so as not to be defeated by alienation, by the auxiliary process of *Warrantia Chartæ;* which is also requisite for securing the advantages of Voucher in Assizes and the like actions where no Actual Voucher is admitted. (592.) It has been held that two Warranties made by and to the same persons and in the same instrument, the one express, the other implied, may stand together: (593.) but it is otherwise with mere Covenants; which, however, do not arise by implication out of any (*a*) words of Grant *in the conveyance of an estate of inheritance,* except under St. 6 Ann, c. 35, s. 30 & 34, and St. 8 G. 2, c. 6, s. 35; by which the words, "Grant, Bargain, and Sell," in Bargains and Sales of Hereditaments in Yorkshire, inrolled according to those Acts, are made

Bustard's Case, 4 Co. 121.

F. N. B. 134.

okes's Case, 4 Co. 80 b.

Butl. Co. Litt. 384. a. n. 1.

[(*a*) The ordinary words in a release, "granted, bargained, sold, released," &c. do not amount to an estoppel. See *Right* v. *Bucknell,* 2 B. & Ad. 282.]

(576.) to have the effect of the usual Covenants for the Title in favour of a Purchaser.

Carth. 77; Co. Litt. 52.b.

(594.) It remains to observe, that what is ostensibly one Instrument, may, from the multifariousness of its contents, be considered as constituting several Deeds, and may therefore require more than one Stamp; but this, it seems, will not be required merely on account of the multiplicity of parties and interests, if there be a real unity in the transaction.

1 Phill. Ev. 513; Boase v. Jackson, 3 B. & B. 185; [Price v. Thomas, 2 B. & Ad. 218.]

Bredon's Case, 1 Co. 76. a.

10 Co. 28 a.; 4 T. R. 65.

(595.) The Law will also, in order to give effect to the Deed, imagine successive acts in the instant of its operation; and will arrange the clauses in the necessary order of time, without regard to their places in the Deed: (596.) but this cannot be carried so far as that one transaction shall have the effect of a Conveyance and Re-conveyance, except by means of a compound Fine, which is called *a Fine Sur Don Grant et Render*. (597.) It seems however, that for any purpose short of this, of two Deeds bearing the same Date, the priority of that which ought to precede will be presumed. (598.) On the other hand, two Instruments executed on the same day, and forming parts of the same transaction, may for many purposes be considered as one Deed. Thus a Conveyance which is in appearance absolute may be subjected to a Condition by another Deed, (called a Defeasance,) made between the same parties and at the same time; which, if it were not executed till the morrow, would

Cru.Fi.71.284.

1 Burr. 106.

Co. Litt. 236. b.; Touchst. 126.

be void. 599. This indeed is not usual, nor advisable; but it often happens that Covenants for the production of Title Deeds, Declarations of Trust, and the like arrangements, are more conveniently made by a separate instrument; and the contrary practice often leads, after a lapse of years, to many fruitless and troublesome yet indispensable inquiries, far more expensive than the additional Stamp and other occasional costs of a divided Assurance. Ca. t. Talb. 64.

(600.) The rules for the construction of Wills are in many respects different from those concerning Deeds. Wills have no *regular form assigned to them; nor are technical words of the same indispensable necessity, nor have they when used the same irresistible force, as in Deeds. This want of formality makes it more necessary to compare all the parts with each other, and with the whole; and also renders it less easy to reject any word as superfluous. (503, &c.) (300.)

(601.) The rule of construction which favours (511.)

* (600. n.) The construction of a Will may, however, be regulated by formalities of the Testator's contrivance. Thus where several distinct devises began each with the word "Item," one of which gave a house to *A.*, and was followed by the words, "And I *also* give to the said *A.* all my household furniture, &c., *all* for her own disposing free will and pleasure," the "also" was taken for a new "Item," which disjoined the words of limitation from the House; in which therefore *A.* took only an estate for life. *Doe* v. *Westley*, 4 B. & C. 667; and see 6 B. & C. 294.

the Grantee, is not applicable to an instrument founded on no contract, and which can never
(512.) be pleaded against its author. (602.) Also of
Harg. Co. Litt. 112 b. n. 1. Mason v. Robinson, 3 Bing. 621. two contradictory clauses, that is in general to be preferred which stands last, as implying a change of the Testator's mind; and thus
(274.) a Codicil, duly executed, supersedes every part of the will to which it is contradictory; though in other respects both instruments are to be considered as incorporated into one. (603.) But
3 M. & S. 306; 5 B & C. 69; Doe v. Oxenden, 3 Tau. 147; 1 Phill. Ev. 541, [Garratt v. Niblock, 1 Russ. & M. 629.] the great leading principle is, that every thing must be referred to the intention of the Testator (*a*) at the moment when he made his Will; (604.) and that, (with * the exceptions before noticed,) this intention must be collected from
(506. 507.) the Will itself. (605.) A misnomer of the de-
7 East. 303. visee does not make the Devise void, if the
(529.) person can be ascertained. (606.) And with respect to the description of the property, the
(544, &c.) rules already laid down will be found applicable,

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* (604. *n.*) There seem also to be some additional exceptions occasioned by the private nature of the Instrument the language of which is likely to be so conformed to the circumstances of the Testator and of his estate, that some knowledge of them may be necessary for its interpretation. See 1 Phill. Ev. 550; *Colpoys* v. *Colpoys*, Jac. 451.

[(*a*) But see St. 1 Vict. c. 26, s. 24, (above, 267, n.,) which appears to establish a different rule of construction; though the saving of any *contrary intention appearing by the will* would seem likely to render the new rule difficult of application.]

with such variations as the above stated differences require. Thus a Devise of "my estate "of Ashton" has been held to include those lands only which lay in the parish of Ashton, and not other adjacent lands which were held by the same Title; nor was extrinsic evidence allowed to be given of the Testator's intention to include all under that name. (607.) But where a Will contained separate devises of the Penline Castle Estate and of the Briton Ferry Estate, with all the Manors, &c. of which the same consisted, the latter denomination was held clearly, upon the face of the Will, not to be confined to the Parish of Briton Ferry, but to signify a collective mass of property known by that name; and therefore evidence was admitted to show whether the lands in question formed a part of it. Nor did an assertion in the Will, disjoined from the description, that the *B. F.* Estate was situated in the County of Glamorgan, exclude from the devise a part of it which happened to be within the County of Brecon. (608.) But words of qualification have in general at least as much force in a Will as in a Deed; and a break in the sentence seems to be less regarded. (609.) General denominations of property, if of a technical kind, (as Messuage with the Appurtenances, &c.) are for the most part to be taken in a technical sense; but they may receive one more ample from the apparent intention.

Doe *v.* Oxenden, *ubi supr.* (563.)

Doe *v.* E. of Jersey, 1 B. & A. 550; 3 B. & C. 870.

(564.)

Roe *v.* Vernon, 5 East, 51; Press *v.* Parker, 2 Bing. 456; Pullin *v.* Pullin 3 Bing. 47.

Buck *v.* Nurton, 1 B. & P. 53.

(546.)

(610.) A general devise of the Testator's

Doe *v.* Roake, 2 Bing. 497;

Revd. in Denn v. Boake, 5 B. & C. 720. Estate or Property, &c., if he have any actual estate or property upon which that devise can (505.) operate, will not affect any subject, not particularly described or in some manner pointed out, which he is able to dispose of by a Power of Appointment only (*a*); for the exercise of such a Power, instead of merely disappointing an heir at law, defeats a vested interest. [See 1 Sugd. Pow. 385, &c.; and Buxton v. Buxton, 1 Keen, 753.] (611.) A (553.) like general Devise will not pass estates held upon trust only or by way of Mortgage, if the disposition be such as cannot be conveniently made of those estates; as, if it create an entail, or charge the land with the Testator's debts: but otherwise they will go to the devisee, who must be supposed as fit a person to hold them as the heir at law. 1 Sand. Us. 358; Coote Mortg. 585; [Galliers v. Moss, 9 B. & C. 267; Mather v. Thomas, 10 Bing. 44; Exparte Barber, 5 Sim. 451.] (510.) (612.) Questions relating to the interchange of conjunctive and disjunctive particles have more frequently arisen in the construction of Wills than of Deeds; and are decided in the same way. 3 T. R. 473.

(482.) (613.) Private Acts of Parliament, which relate to one particular thing, are, it is said, to be interpreted literally. This however cannot 2 Mod. 57.

[1 Vict. c. 26.] [(*a*) The rule, however, under the late act, is different. Section 27 enacts, that a general devise of the real estate of the Testator, or of the real estate of the Testator described in a general manner, " shall be construed to include " any real estate, or any real estate to which such description shall extend, (as the case may be,) which he may " have power to appoint in any manner he may think proper, and shall operate as an execution of such power, " unless a contrary intention shall appear by the will."]

exclude all regard to the general intention appearing from the * Preamble and other Parts of the Act. And it is obvious that whatever rules have been established relating to the exposition of Deeds, must be applicable, so far as they are founded upon the universal principles of criticism, to all contracts and laws which profess to be written in the ordinary language of men; and that the same rules must be applicable, so far as concerns the description and incidents of the subject matter, more especially to such of those Contracts and Laws as differ from Deeds of Conveyance only in the absence of some 8 Tau. 13. *arg.*
formalities and in the greater solemnity of their sanction.

(614.) The King's Patents are in general to be construed strictly in favour of the Crown; (486.)
and if it appear that the King was deceived, See 5 Bac. Ab. 602.
the Grant is void.

(615.) Fines and Recoveries are the most formal of all assurances; and the construction (487.)
of them, though not without indulgence to the intention, still partakes of that strictness which is applicable to judicial proceedings between

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* (613. *n.*) How far the enacting words of Statutes may be restrained by the Preamble, see 6 Bac. Abr. 381; 3 M. & S. 66, 4 M. & S. 239. And as to the construction of Statutes in general, see 1 Bl. Comm. 87; 6 Bac. Abr. 379. The Title of a Statute, though not properly a part of it, is often made use of in argument. See 8 T. R. 165; 2 B. & C. 37; 3 B. & C. 15. 17, 18; Id. 183.

Touchst. 10. 41. adverse parties. And therefore every thing
(84.) ought here to be described by its specific name, as Messuage, Garden, Land, Meadow, Pasture, Wood, &c.; and not by such general words as
(559.) Tenement or Hereditament. It appears, however, that in these as in other Assurances, if the word *Land* be used *alone*, it will include Houses, and all other modifications of the soil. And many denominations are admissible, which are not strictly technical, or not adapted to the Forms of that kind of Action which the Assurance represents. (616.) Either the Vill or the Parish, (for there may be several Vills in one Parish,) must be named, in which the property is situated; or if it extend or lie dispersed through several of those districts, they must all be enumerated; but it is not usual to distinguish the parcels lying in each. (617.) Where a place is named, without expressing it to be a Parish, it is understood to be a Vill; and therefore where the Parish of Street contained the two Vills of Street and Walton, and a Fine was levied of lands in Street, it was held not to extend to those in Walton. But if the authority of the Constable of Street had extended into Walton, although the latter might have had a Tithing Man of its own, it would have appeared to be only a Hamlet included in Street, and not a distinct Vill. (618.) And allowing it to be a Vill, yet if the Conusor had had no lands in the Vill of Street, and the Deed had shown an intention to pass all his lands in the Parish,

Cro. El. 476; 4 Bing. 90.

Dormer's Case, 5 Co. 40. b. Massey v. Rice, Cowp. 346.

Stork v. Fox, Cro. Jac. 120.

Waldron v. Roscarriot, 1 Mod. 78; 1 Ventr. 170.

Addison v. Otway, 1 Mod. 250; 2 Ventr. 31.

those in Walton, it seems, would have been considered as originally comprised in the Fine, without the necessity of an Amendment.

(619.) Having now taken a general view of the ordinary instruments of Alienation, we may consider how far their absence can be supplied by mere presumption. As to which, it is T. Jon. 182;
evident, the general rule must be, that what Plowd. 193. a. 431. a.
does not appear is supposed not to exist; and therefore the inheritance must always be presumed to continue in the person who is last known to have held it; and no mere length of Doe v. Reed, 5 B. & A. 232;
possession, short of that which is required by Doe v. Calvert, 5 Tau. 170.
the Statutes of Limitation, can be a bar to his [See 370, n.]
claims. (620.) But where there is no Statute Cowp. 215.
for the protection of long possession, Grants even from the Crown have been presumed. (621.) And an exception is to be made in the case of those general trusts, or secondary Uses, (152.)
which, however clearly within the intention of See 2 B. & B. 18.
the Statute of Uses, have escaped from its operation. When no particular purpose is to be answered by continuing the estate in the Trustee, it becomes desirable that it should be conveyed to the equitable or beneficial owner, that his possession may be fortified by a legal right to the inheritance. And if the instrument by which the duties of the Trustee are ascer- England v. Slade, 4 T. R.
tained contain any express direction to him to 682; Doe v.
make this conveyance at a determinate time, it Sybourn, 7 T. R. 2.
seems, that in order to support any Lease or other Assurance made subsequently to that

time by the Equitable owner, a Jury will always be directed to presume the prescribed conveyance to him to have been duly made; and this with little or no regard to the length or shortness of the period which may have since elapsed. (622.) But no conveyance can be presumed which would have been in any way inconsistent with the duty of the Trustee. And in those cases where the conveyance, though it may appear to have long ago become desirable, has not been imperatively directed upon the creation of the Trust, it seems that no certain rule can be laid down, and much must always be left to the discretion of the Jury; but here also the clearness of the equitable title, and the alienations and other dealings of its holders, are in general more to be regarded than the antiquity or recency of the fact to be presumed. (623.) When, however, this antiquity may be supposed to extend beyond sixty years, there is reason, not unsupported by authority, to contend, that although there can be no adverse possession of the equitable owner against his own Trustee, and therefore the Statute of 32 H. 8, c. 2, is not directly applicable, yet it ought, for the sake of convenience, to be applied by analogy, so as to render the presumption in such cases peremptory.

Keene v. Deardon, 8 East, 248.

[And see R. v. Inh. of Scarisbrick, 6 A. & E. 509.]

8 T. R. 122; 8 East, 267.

Hillary v. Waller, 12 V. J. 239. But see Doe v. Passingham, 6 B. & C. 305.

(400.)

[Emery v. Grocock, 6 Madd. 54; Cooke v. Saltau, 2 S. & S. 154; Noel v. Bewley, 3 Sim. 103.]

(624.) Though Courts of Justice, in deciding between the claims of adverse parties, cannot in general require proof of a negative; yet such proof, where it is to be had, may be very

necessary for the satisfaction of a Purchaser. And accordingly, in Titles by Descent, it is usual to require such evidence of the Ancestor's intestacy as to the property in question, as may be afforded by a Will not comprehending that property, or not sufficiently attested; or by Letters of Administration, which issue in cases of general intestacy; or at least by a search for such documents in every Ecclesiastical Court which the circumstances point out as likely to contain them. However, as a Will which relates solely to Real Estate does not require to be exhibited in the Ecclesiastical Court, the evidence thus afforded can never be absolutely conclusive. (625.) And as to any other unknown Alienations and Settlements; the purchaser must in general content himself with the
protection of St. 27 Eliz. c. 4, against such as (224.)
are voluntary, and with the arguments from possession of the Land and Title Deeds, from the character of the Vendor and his Agents, and from general reputation, against the existence of any which are capable of being enforced against him. The same thing may be said of Incumbrances by way of Mortgage, (which indeed, so far as concerns the legal estate, are Alienations,) and such Grants of Annuities
charged upon the Land as are excepted out of (234.)
the Statute 17 G. 3, c. 26, or 53 G. 3, c. 141 *.

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* (626.) Other possible Defects of Title or Incumbrances, of a legal kind, are Acts of Bankruptcy not pro-

(627.) Yet such is the natural disposition of mankind to be satisfied with any thing approaching to moral certainty in their affairs, that the mathematical certainty afforded in these cases by the Registry Acts for Middlesex, Yorkshire, &c. has not in general been very highly appreciated, however culpable the neglect of its advantages might be esteemed. There is, indeed, a new danger * introduced by these Acts: for if a Purchaser or Mortgagee neglect to register his own Conveyance, it may possibly be super-

(235.) Sugd. Let. to Humph. 38.

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vided against by St. 6 G. 4, c. 16, s. 81 and 86 (*a*), or by
(249, 250.) the laws previously in force on this subject, as St. 21 Ja. 1, c. 19, s. 14; St. 46 G. 3, c. 135; and 49 G. 3. c. 121, s. 1; (see Sug. Vend. 644, &c.) debts due to the Crown upon
(253.) Bond, or from its Accountants, for the discovery of which it is to be regretted that no Office has been established (*b*); and Judgment Debts, of which hereafter. (Chap. 5, sect. 1.)

* (627. *n*.) An additional inconvenience attending the Register Acts, and which, under the present system, seems inseparable from all attempts to raise the certainty of a good Title beyond a high degree of probability, is the complication of obsolete instruments thus obtruded upon the Purchaser's notice, of which the contents are seldom or never sufficiently apparent from the Memorial in the Register, though enough appears to provoke a fruitless inquiry. The inconvenience, however, is to be imputed rather to our system of Entails, than to any thing necessarily connected with Registration; and there can be no doubt of the competency of the Legislature to remove it.

[(*a*) See now St. 2 Vict. c. 11, ss. 12, 13, and St. 2 Vict. c. 29; above, 249, n., 250, and n.]

[(*b*) But see now St. 2 Vict. c. 11, ss. 8, 9, 10; above, 253, n.]

seded by a second Conveyance from the same Vendor or Mortgagor to a more diligent contractor, a danger which, however easily avoided, has not seldom been incurred, and probably hangs over many titles at this day; but is rendered less alarming by the relief which Courts of Equity would afford against the subsequent purchaser, if privy to the fraud. (628.) The Acts, it is to be observed, have not prescribed any time within which the Registration must be made, whether of Deeds or Wills, except that as to the former they require the concurrence of one of the persons who were witnesses to the execution; but with respect to Wills, they have provided that a Registration within six months after the Testator's death, (if he die in Great Britain, but otherwise within three years,) shall be as effectual as if made immediately; and where the Registration within that time is prevented by accident, a memorial of that fact registered within the same time for Yorkshire, but for Middlesex within two years after the Testator's death if in Great Britain, or four years if abroad, will cause an extension of the period thus allowed for effecting an equivalent to immediate registration.

Sug. Vend. 662, 665.

(629.) The Evidence of Title by Descent necessarily includes that of Pedigree; as to which, the only regular documentary proofs established at this day are contained in the Parish Registers of Baptisms, Marriages, and

Doug. 165; 1 Phil. Ev. 400. Burials (*a*). These are in the nature of Records; examined extracts from them are received

[(*a*) By St. 6 & 7 W. 4, c. 86, (amended by St. 1 Vict. c. 22,) a General Register Office is provided for keeping a register of Births, Deaths, and Marriages in England. The
[632.] act repeals so much of the St. 52 Geo. 3, c. 146, and St. 4 G. 4, c. 76, as relates to the Registration of Marriages*, (s. 1,) but does not affect the Registration of Baptisms and Burials as by law established. (s. 49.)

The form for general Registration of Births comprises the time of birth, name, and sex of the child†; the name, surname, maiden surname, and profession of the parents; the signature, description, and residence of the *informant*‡, (who must be the father or mother, or, in case of their inability, the occupier of the house, s. 20,) the date of registration, and signature of the registrar, and also the child's baptismal name, (if any be given after registration within six months.) See Schedule A.

That for Deaths, comprises the time of death, name and surname, sex, age, profession, and cause of death of the deceased†; the signature, description, and residence of the *Informant*‡, (who must be some person present at the death, or in attendance during the last illness, or else the occupier of the house, s. 25,) with the date of registration, and the signature of the registrar. See Schedule B.

And the universal form for Registration of Marriages comprises the date of the marriage, the name and surname,

[* By St. 6 & 7 W. 4, c. 85, marriages may be contracted or solemnized in any registered place of worship, in the presence of some Registrar of the district, (s. 18, &c.) or even before the Superintendent Registrar of the district, in his office; (s. 21, &c.) and such marriages are declared to be good. (s. 35.)]

[† By 1 Vict. c. 22, s. 7, the Registrar General is empowered to direct that the place of birth or death of the person whose birth or whose death is registered, shall be added to the entry.]

[‡ By s. 28, no register of birth or death *according to the act*, shall be given in evidence, unless signed by some person professing to be the informant, and to be such party as is required to give such information to the Registrar.]

in Courts of Justice; and certificates under the hand of the Minister of the Parish are resorted to for private purposes. (630.) By St. 52 G. 3, c. 146, s. 12, the Registrar of each Diocese is directed to make alphabetical lists, open to public search, of the persons and places mentioned in the yearly returns, which the same Act requires from every parish in the Diocese, of the entries made in the Registers since the end of the year 1812. (631.) The entries of Baptism, under this Act, must contain, besides the date and the child's name, the Christian and Surnames, Abode and Quality, Trade or Profession, of his Parents; some or all of which particulars have been commonly inserted in former Registers; and the mention of the Parents as Husband and Wife, has been considered *primâ facie* evidence of legitimacy. It has also been usual in some places to state the time of birth in the Register; but neither this nor the age of the child when baptized is required by the late Act; nor has the Clergyman any authority to insert it; and it may be doubted whether

8 V. J. 430.

3 Stark. Ev. 1117. See 5 B. & C. 509, 510.

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age, condition, profession, residence, father's name and surname, and father's profession, of each of the parties; together with the place and form of marriage, and the signatures of the person marrying, of the parties, and of two witnesses. See Schedule C.

Searches may be made and certified copies obtained, at the General Register Office, or at the Office of the Superintendent Registrar of the district, or from the Clergyman, or Registrar, or other person, who shall for the time being have the keeping of the register books.]

the Register of Baptism can strictly be said to afford *primâ facie* evidence of the person's age. [See 629, n.] (632.) By the Act of 1812,* and the late Marriage Act, St. 4 Geo. 4, c. 76, s. 28, the entry of a Marriage must express the Parish in which each party resided, and the consent, (if requisite) of Parents or Guardians, and must be attested by two witnesses to the performance of the ceremony; whose testimony, however, will not be indispensable for proving the marriage in a Court of Justice, if other evidence can be obtained of the identity of the parties in question with those named in the Register; nor is the entry itself necessary to the validity of the Marriage; which, if not registered, might be proved by other means, as is necessarily the case among Jews and Quakers (*a*). (633.) In the Registry of Burial, the Act of 1812 requires the age, as well as the abode, of the deceased to be mentioned. (634.) The Probate of a Will, or Letters of Administration, would not it seems, of themselves be considered by a Court of Law as even *primâ facie* evidence of the Testator's or Intestate's death; but it seems reasonable to rely on such proof in private transactions, on account of the extreme impro-

Doug. 166; 1 Phil. Ev. 409.

[See 629, n. & n. †.]

Moons v. De Bernales, 1 Russ. 301.

[(*a*) The marriages of Quakers and Jews, solemnized according to their respective usages, are declared to be good, provided both parties are Quakers, or both Jews, and provided the preliminary Notice to and Certificate of the Superintendent Registrar, required by the act, have been given and issued. See 6 & 7 W. 4, c. 85, s. 2, & 1 Vict. c. 22, s. 1.]

bability of such documents being procured in the party's lifetime.

(635.) Other documentary proofs are of a less formal kind. The time of a person's birth may be shown by an entry in the Books of the Accoucheur employed on the occasion. (636.) And declarations of deceased members of the family, (though not of mere friends or servants), have repeatedly been admitted as evidence in questions of Pedigree. Of this kind are statements in a Will, though cancelled; recitals in a Deed, or in a Bill in Chancery; entries in a Family Bible; Monumental inscriptions (*a*), and the like. (637.) But such declarations will be of no avail, if they appear to have been made after the matter had been called in question; and therefore, (as may be presumed,) with a particular object in view.

Higham, v. Ridgway, 10 East. 109.

Johnson v. Lawson, 2 Bing. 86,

Bull.N.P.246; Doe v. E. of Pembroke, 11 East. 504; 7 T. R. 3. n.; 1 Phil. Ev. 239; [1 My. & Cr. 358.]

1 Phil. Ev. 241. [1 My. & Cr. 356.]

(638.) When a person has not been heard of for seven years, his death may be presumed. (639.) And the best proof that a person was never married, or had no issue, (a fact without which no collateral descent can be established,) is, that none of his family ever heard of it.

6 East. 85. 4 B. & A. 434. [See Doe v. Nepean, 5 B. & Ad. 86.] Rowe v. Hasland, 1 Bl. Rep. 404; Doe v. Griffin, 15 East. 293.

(640.) Where Land has been peaceably enjoyed by a Purchaser from an ostensible heir at law, it is not usual, (under ordinary circumstances,) upon a re-sale after thirty or forty

1 Prest. Abstr. 44. See Fort v. Clarke, 1 Russ. 601.

[(*a*) Or the copy of a mural inscription in the parish church, which had been effaced. *Slaney* v. *Wade*, 1 My. & Cr. 338.]

years from the death of the first Vendor's ancestor, to require proof of his Pedigree.



CHAP. II.

OF ESTATES IN FEE TAIL.

SECT. 1.—*Of the Nature and Creation of Estates Tail.*

Co. Litt. 19. a. (641.) BEFORE the Statute of Westminster the Second, (13 Edw. 1, of which the first Chapter is known as the Statute De Donis Conditionalibus,) if any one gave lands or tenements to another, *and the heirs of his body*, the estate was considered a fee simple conditional, which could not be absolutely aliened until the performance of the implied condition, namely, that a child should be born to the donee. (642.) If there were no such child, or if after his birth no alienation were made, the property, upon failure of the donee's posterity, to whom only it was descendible, would revert to the donor or his heirs; who, if their title were disputed, were enabled in such cases to enforce their claims by means of a writ called Formedon.

(643.) By the Statute just mentioned it was enacted, * "That the will of the Giver accord-

* (643. n.) The following are the words of the Original: "Quod voluntas, donatoris, secundum formam in carta "doni sui manifeste expressam, decetero observetur, ita

" ing to the Form in the Deed of Gift mani-
" festly expressed should be observed, so that
" they to whom a tenement was so given under
" condition should not have power to alien the
" same Tenement, whereby it should not remain
" after the death of the donees, to their issue,
" or to the donor or his heir if issue failed."
And a writ of Formedon was accordingly given to the issue, to whom the estate ought to descend; which has since been distinguished as the Formedon in the Descender. (644.) Thus the Rights of the Donor and of the Donee's posterity were secured; and it is said that by the same Statute the Donor acquired an actual estate in reversion, where he had before only a possibility of reverter. This could only be effected by the conversion of the conditional fee simple into a Particular Estate; which character it obtained, under the new name of Fee Tail, (derived from *taillare* or *tailler*, to cut or reduce into new dimensions and form.) The necessary consequence would be that a Remainder might also be made to depend on an Estate Tail; and hence a Writ of " Formedon in the Remain-

Co. Litt. 22. a. But see 5 Bac. Ab. 717.

Litt. 18.

" quod non habeant illi, quibus tenementum sic fuit datum
" sub conditione, potestatem alienandi tenementum sic
" datum, quo minus ad exitum illorum quibus tenementum
" sic fuerit datum remaneat post eorum obitum, vel ad
" donatorem vel ad ejus heredem, si exitus deficiat, per
" hoc quod nullus sit exitus omnino, vel, si aliquis exitus
" fuerit, per mortem deficiet, herede hujusmodi exitus
" deficiente."

Plowd. 235. a. "der" came into use, though it is not expressly given by the Statute de Donis.

(370.) [See 375,n.] (645.) The Actions grounded on these Writs of Formedon must now, by particular enactments in the before mentioned St. 21 Ja. 1, c. 16, s. 1 & 2, be commenced within twenty years after the title accrued, or ten years after the removal of disabilities; so that in general, where right is derived from an Entail, the remedy must be pursued within the same time, whether by Formedon or Ejectment; and if the latter be practicable, it will of course be preferred. In what cases it is not practicable, will appear in the next Section.

Co. Litt. 19. b. 20. a. (3.) (646.) The word "Tenement" in the Statute de Donis is taken in its most comprehensive sense; and therefore every subject of Real Property is capable of being entailed.

(647.) Estates Tail are either General or Special. Litt. 14, 15. Tail General is where only one person's body is specified, from which the issue must be derived, as, where the gift is simply to *A.* and the heirs of his body. Tail Special is Litt. 16. 29. where both the original parents are marked out, as, if it be to *A.* and the heirs of his body to be begotten upon *B.*, or to *B.* and the heirs [Doe v. Featherstone, 1 B. & Ad. 944.] of her body to be begotten by *A.*; or to *A.* and *B.* and the heirs of their bodies; in which last case the parties are Joint-tenants of the inheritance. Litt. 283, 284. (648.) But if the gift had been to two persons either of the same sex, or by law absolulety incapable of intermarriage, and the heirs

of their bodies; then they would have been Joint-tenants for life, (so that the entirety would go to the survivor for his life,) but Tenants in Common in remainder of the Inheritance in Tail General.

(649.) Again, whether General or Special, the Estate Tail may be made descendible to all the issue in their order without distinction of sex, as in the preceding examples, or it may be confined to the heirs male, or, (which is not very usual,) to the heirs female. In the two latter cases, (which are distinguished by the appellations of Tail Male and Tail Female,) the descent must be traced entirely through males, or entirely through females. Litt. 21, 22, 23, 24, 25, 26, 27.

(650.) Half blood is no impediment to the descent of an Estate Tail. (651.) In * general in the creation of an Estate Tail, the word "*heirs*" is as necessary as in the Transfer of a Fee Simple; (652.) and there must also be some words which appropriate the heirs to the body from which they are to issue. But for this purpose no peculiar form is necessary. Thus if the gift be to a person "and his heirs "if he have heirs of his body, and if he die "without heirs of his body, to revert to the "donor," this is a good estate tail; and so if it be "to him and his heirs, and if he die *without* "*issue*, to remain to another." Co. Litt. 15. b. (322,) [& n.] Co. Litt. 20. a. b. 1 Ventr. 228; Co. Litt. 21. a. 1 P. Wms. 57. n. [See 660. n.]

* (651. *n.*) The gift called "in Frank Marriage," (Litt. s. 17,) which is grown obsolete in practice, is an exception.

(339.) Co. Litt. 22. b.; Fearne, C. R. 28.; [1 B. & Ad. 944.] Mandeville's Case, Co. Litt. 26. b.

(653.) The "Rule in Shelley's Case" is as much applicable to Estates Tail as to Estates in Fee Simple.

(654.) And where the gift is to the heirs of the body of a person who is dead, or to whom no estate of Freehold is given, so that the first heir must necessarily take by purchase, he takes an estate tail, descendible, not only to his own issue, but to all the issue of the person first mentioned, in the same course and manner as if the estate tail had been given to that person himself.

Co. Litt. 24. b.

(655.) If indeed the gift were to the heirs *male* of the body of *A.*, and the first person to whom an estate in tail male, if given to *A.* himself, would have descended, happened

(315.)

not to be the heir general of *A.* (as would be the case if he were the second son, and his elder brother had died, leaving a daughter,) it was formerly held that such a person, not being heir male in every sense of the words, could not take the estate by purchase, and therefore the gift was void: but this doctrine has been contradicted in so many particular instances, that it is hard to say in what case it can now be supported.

Wills *v.* Palmer, Fearne, C. R. 44; Goodtitle *v.* Burtenshaw. Butl. App. to Fearne, C. R. 570. See however, 5 B. & C. 93; [And see Doe *v.* Easley, 1 Cr. M. & R. 823; Willis *v.* Hiscox, 4 My. & Cr. 197.] (283.)

(656.) The creation of Estates Tail by Will is viewed with the same indulgence as the Devise of Estates in Fee Simple. The leading rules which have been established relative to this subject shall close the present section.

Co. Litt. 9. b.

(657.) A devise to *A.* and his seed gives him an Estate Tail.

(658.) So, to *A.* and his heirs male, gives an Estate in Tail Male: but if this expression had been in a Deed, the word "male" must have been rejected; for, consistently with the rules of law, it can be significant only as giving a hint of intention to create an entail, which in a Deed is not sufficient. Co. Litt. 27. a. b.

(559.) So also it has been held that a Devise "to *A.* and his heirs lawfully begotten" gives an Estate Tail. Hale in Harg. Co. Litt. 20. b. n. 2.; Nanfan v. Legh, 7 Tau. 85.

(660.) To *A.*, and if he (*a*) die before issue, or not leaving issue, or not having a son, then to another: all these devises give estates in tail, and the last in tail male. 4 Bac. Ab. 256.

(661.) And even if the first devise be expressly to *A.* for life, yet if the remainder be 2 Fonbl. Eq. 57.

[(*a*) But in wills under the late act, 1 Vict. c. 26, "the "words *die without issue*, or *die without leaving issue*, or "*have no issue*, or any other words which may import "either a want or failure of issue of any person in his lifetime "or at the time of his death, or an indefinite failure of his "issue, shall be construed to mean a want or failure of is- "sue in the lifetime or at the time of the death of such "person, and not an indefinite failure of his issue, unless a "contrary intention shall appear by the will, by reason of "such person having a prior estate tail, or of a preceding "gift being, without any implication arising from such "words, a limitation of an estate tail to such person or "issue or otherwise: Provided that this act shall not ex- "tend to cases where such words as aforesaid import if no "issue described in a preceding gift shall be born, or if "there be no issue who shall live to attain the age or other- "wise answer the description required for obtaining a "vested estate by a preceding gift to such issue." (s. 29.)]

to take effect upon his dying without issue, the implication of benefit to the issue controls the restriction; or perhaps may be said to explain it, for Tenant in Tail may to some purposes be considered as Tenant only for his life.

[Parr v. Swindells, 5 Russ. 283.]

1 Ventr. 230; Hale in Harg. Co. Litt. 21. a. n. 4.

(662.) However, though an Estate for life may thus be enlarged by implication into an Estate Tail, a confined or restricted Estate Tail cannot be enlarged in the same manner, nor a further Estate Tail in remainder supplied. Thus, upon a Devise to a man, and the heirs male of his body, and if he died *without issue*, then to another; this did not make the estate descendible to both sexes.

8 T. R. 9.

(663.) To *A.* and his heirs, and if he die without heirs, then to *B.* The effect of this devise must depend on circumstances. *B.* will take nothing unless he be capable of becoming the collateral heir of *A.*; but if he bear that relation, it is plain that the "heirs of *A.*" must mean his lineal heirs, or heirs of his body.

(664.) But it is to be observed that where, after giving the fee to *A.* the Will proceeds to dispose of it otherwise, upon his death without issue taking place *within a limited period*, if that period be not too remote, the ulterior disposition will be considered as an executory devise defeating the fee first given; and not as a remainder expectant upon an estate tail, (into which that fee would if necessary have been contracted for the sake of supporting such disposition.) Thus upon a devise to *B.* and his

Pells v. Brown, Cro. Jac. 590.

heirs for ever, and if he died without issue, *living A.*, then to *A.* in fee: *B.* took a fee simple, subject to be defeated, in the event specified, by the executory devise to *A.*

(665.) It should be understood that in all questions of this kind relating to the inheritance, the words "dying without issue," or even "without leaving issue," are taken of themselves to mean death and the want or failure of issue (*a*) whenever that failure may happen; so that if a man die leaving issue surviving him, yet the subsequent extinction of his line is the fulfilment of the required event.

Forth *v.* Chapman, 1 P. Wms. 663; Butl. Fearne, C. R. App. 611.

(666.) But by a devise "to *A.* for life, and "if he shall die without issue *living at his* "*death*, to *B.* in fee, but if *A.* shall have issue "living at his death, then to the right heirs of "*A.* for ever," *A.* is tenant for life, with a contingent remainder to himself in fee, concurrent in the alternative with the other contingent remainder to *B.*

Plunket *v.* Holmes, 1 Lev. 11.

(667.) Upon a Devise to a person "and his "issue," or "children," the construction varies according to circumstances. If the party have issue or children at the time when the devise is made, they will take estates, it seems, for their lives jointly with their parent; but if he had no issue at that time, he takes an estate tail.

Wild's Case, 6 Co. 16. b.; King *v.* Melling, 1 Ventr. 225; and see 3 Atk. 397,

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[(*a*) But see, as to wills made since the first of January, 1838, the note to 660, above.]

(668.) Where tenements are (*a*) devised to two persons severally in tail, or the same tenement to two as tenants in common in tail, and upon failure of their issue to a third person, with an apparent intention that he should take the whole at once, Cross Remainders in tail between the two first devisees are to be implied; *i. e.* it is to be understood that each takes a vested remainder in tail expectant upon the other's estate. (669.) It is said that where these Cross Remainders are to be raised by implication between two and no more, the presumption is in favour of them; but where they are to be raised between more than two, the presumption is against them. (670.) However, in cases where land is given to several members of one family as Tenants in Common in tail, the rule seems to be applicable to them, however numerous. Thus, upon a Devise "to all "and every the children of *B.* begotten, if more "than one, equally to be divided among them, "and to their heirs of their respective body "and bodies, as tenants in common; and if "only one child, then to such only child and "to the heirs of his or her body issuing, and "for want of such issue," then to another; Cross Remainders were implied between the children. And in a Case where the Testator gave his lands to *A.* for life, then to the sons of *A.* successively in tail, with remainder to all

Cowp. 780; and Doe *v.* Cooper, 1 East. 229.

Watson *v.* Foxon, 2 East, 36; [Livesey *v.* Harding, 1 Russ. & M. 636.]

Roe *v.* Clayton, 6 East, 628.

[(*a*) Cross Remainders will not be implied in a Deed. See *Edwards* v. *Alliston*, 4 Russ. 78, 83.]

and every the daughter and daughters of *A.* in tail as tenants in common; " and for default of " such issue, then to the issue of the Testator's " Sisters, *B. C. D.* and *E.* in tail, in such man- " ner as he had limited the same to *A.*'s issue; " and for default of such issue, to remain to his " own right heirs for ever:" it was decided that Cross Remainders should be implied, not only between the daughters of each Sister in their own family, but between the families themselves of the Sisters; as the Testator did not intend his heirs (as such) to take any thing while any issue of his Sisters remained.

SECT. 2.—*Of the Alienation of Estates Tail.*

(671.) THE Statute de Donis does not peremptorily annul the alienations made by Tenant in Tail, but forbids that the issue be disinherited by them; nor does it determine in what manner the disherison shall be prevented, whether by giving a right of entry to the heir, or by merely reserving to him that right of Action (Formedon in the Descender,) which is specified in the Statute. On this subject the following distinctions were early established: (643.) (402.)

That the Feoffment or Fine of Tenant in Tail of Land, in possession by virtue of the Entail, caused a (*a*) *Discontinuance* of the Litt. 595, 596, 597.

[(*a*) By St. 3 & 4 W. 4, c. 27. s. 39, no Discontinuance or Warranty made after the 31st of December, 1833, shall defeat any right of entry or action for the recovery of land; and see below, 682, n.]

entail, whereby the issue, and the persons in remainder and reversion, were put to their Formedons.

Litt. 615, 616, 617, 618. (98, 42.) (672.) But that the Grant or Fine, (which operates as a Grant,) of Tenant in Tail of Land in Remainder expectant upon an Estate of Freehold, or of Tenant in Tail of an Incorporeal Tenement, whether in possession or remainder, had no such effect, but left a right of entry or enjoyment without action, to the persons who should be entitled under the entail.

Litt. 630, 631. (673.) A Discontinuance may be either in fee, or for a more limited period; its effect will remain while the estate created by the conveyance of the Tenant in Tail continues. And if he

Litt. 620, 621, 622. make a lease for the life of the lessee,* this lease, by virtue of the livery of seisin, and as creating an estate which may possibly extend beyond the life of the lessor, is a discontinuance during that estate; and therefore the lessor is no longer Tenant in Tail, but acquires a new reversionary estate in fee simple. If now he grant this reversion to a third person, and he, by the death of the lessee *in the lifetime of the Grantor*, become seised of the land, the Discontinuance is then extended to the whole fee simple, just as if the Tenant in tail had originally made a

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* (673 *n.*) This must be understood of such a Lease as is not authorized by the St. 32 H. 8. c. 28, the conditions of which are stated at the end of this Section. [And see moreover, below, 682, n., 716, n. (*b*).]

feoffment in fee; but without this seisin of the Grantee in the lifetime of the Grantor, the mere alienation of the Reversion does not enlarge the Discontinuance.

(674.) But a Discontinuance made in the manner above mentioned; though it may be of limited duration, cannot while it lasts have a partial operation in respect of the persons whom it affects. If the estate tail be discontinued, so are all the remainders and the reversion. And therefore if Tenant in Tail enfeoff him who has the immediate reversion or remainder in fee, it being decided that the estate of the latter is not altered, it follows that there is no discontinuance at all.

Litt. 625, 626. See Cro. Car. 321. 405.

(675.) There may however be a Discontinuance, without Feoffment or Fine, by the obligation of a (*a*) Warranty descending on the person entitled under the entail. Thus, if Tenant in Tail be disseised, and then release his right to the Disseisor, with a Clause of Warranty against himself and his heirs, and afterwards die; now his eldest son is not allowed to enter into the land, but must bring his Action of Formedon, in order to give the Disseisor an

Co. Litt. 328, 329, a. (588. *n.*) [Doe *v.* Jones, 1 C. & J. 528.]

[(*a*) But now, by St. 3 & 4 W. 4, c. 74, s. 14, all Warranties of Lands made after the 31st of Dec. 1833, by Tenant in Tail, shall be void against the issue in tail and all persons whose estates are to take effect after the determination, or in defeasance of the estate tail. And see above, 671, n.]

opportunity of pleading the Warranty. It is plain that this is but a partial discontinuance, for it extends only to those persons on whom the obligation of the Warranty descends; who will be the heirs general (according to the rule of descents in fee simple) for the time being, of the person who made the warranty.

Co. Litt. 12 a.; 376.

Litt. 659, &c.

(676.) If, after a Discontinuance, the person immediately entitled under the entail become seised of the Freehold, without having directly concurred, when under no disability, in the acquisition: as, if it come to him by descent or devise, or by virtue of a remainder given to him by a conveyance to which he was not party; or by immediate conveyance to him when under age, or (if the person be a female) when under coverture; in all such cases, as a rightful estate is preferable to one of wrongful origin, and an estate tail in one respect, (namely, freedom from the ancestor's incumbrances,) is preferable to a fee simple, and as the party, in order to recover his estate tail, must bring his Formedon against the Tenant of the Freehold, but cannot bring it against himself; and as he is placed in this dilemma without any fault of his own; the Law at once annuls the Discontinuance, and *remits* or restores the Tenant to his just inheritance. (677.) And this Remitter is so far indulged, that, contrary to the general rule of Law, it may sometimes invalidate the party's own acts and release him from their consequences. Thus, if after a Discontinuance,

Litt. 660.

the heir apparent to the right of the entail become seised of the freehold by any of the means before mentioned, and then grant a Rent out of the land, and afterwards the right of the entail descend to him; now the rent ceases, for it was never charged upon the estate tail, to which the grantor is remitted. (678.) It has been held, (though perhaps without much reason,) that if the freehold be acquired by virtue of the Statute of Uses it cannot cause a Remitter, because the Statute is express that the party shall have the same estate in the land which he had in the Use. To this, if it were not useless to contend against authoritative decisions, it might easily be replied, that the Statute only determines what estate shall be transferred to and once vested in the party, but does not pretend to guard against the accidents to which that estate may be liable from the circumstances of the recipient.

Co. Litt. 348. b.

(128.)

(679.) When, in an action of Formedon, the Warranty of an Ancestor of the Demandant is pleaded against him, the effect is different according to circumstances. If the Warrantor were any person from or through whom the right of the Estate Tail either did descend, or from the nature of the original gift might possibly have decended to the Demandant, the warranty is said to be Lineal; and this is no bar to his demand, except so far as the loss of the entailed property is compensated by the value of other Tenements which have descended

(642, 643, 644.) [See 375, *n.* 671, *n.* 675, *n.*] Litt. 703, 704, 705, &c.

to him from the same Ancestor in fee simple. (680.) But if the Warrantor were a person from whom, though the Demandant had the misfortune to be his heir, he could never have derived his right to the estate tail in question, this Warranty is called Collateral; and, for some reason very difficult to discover, has been decided to be a bar to the Demandant's claim without any compensation. (681.) By the St. 4 Ann. c. 16, s. 21, these Collateral Warranties are rendered void except when made by a person actually seised of an estate of inheritance in the Tenement: their effect is therefore now confined to cases which resemble the following; *A.*, being donee in tail, with remainder to *B.* in tail, discontinues with warranty, and dies without issue; *B.* is his brother or other collateral heir; here as *B.* takes his estate originally by purchase, it is impossible that he should derive any right to it by descent from *A.*, and therefore the Warranty is collateral, and not being effected by the Statute, will be a final bar to the claims of *B.*

(682.) (*a*) But the most effectual process by

[66. *n.*] [(*a*) The St. 3 & 4 W. 4, c. 74, which abolishes Fines and Recoveries, enacts, (s. 15,) " That every *actual tenant " in tail, whether in possession, remainder, contingency, or " otherwise, shall have full power to dispose of an estate " in fee simple absolute, or for any less estate, the lands

[* That is, as explained in s. 1, every tenant of an estate tail which shall not have been barred, although the estate tail may have been divested, or turned to a right.]

which the heirs and the persons in remainder and reversion may be all cut off at once, and

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" entailed as against all persons claiming the lands entailed " by force of any estate tail which shall be vested in or " might be claimed by, or which, but for some previous act, " would have been vested in or might have been claimed " by, the person making the disposition, at the time of his " making the same, and also against all persons, including " the King's Most Excellent Majesty, his heirs and suc- " cessors, whose estates are to take effect after the deter- " mination or in defeasance of any such estate tail; saving " always the rights of all persons in respect of estates " prior to the estate tail in respect to which such disposi- " tion shall be made, and the rights of all other persons, " except those against whom such disposition is by this act " authorized to be made."

And, by s. 19, where an estate tail has been barred and converted into a base fee, the person who would otherwise have been actual tenant in tail is empowered to dispose of the land, as against all persons whose estates are to take effect after the determination or in defeasance of the base fee, so as to enlarge the base fee into a fee simple; with the same saving of rights as in s. 15.

But the consent of certain other parties is made necessary in some cases, to enable the Tenant in Tail to make a complete disposition under either of these two sections;— as to which, see below, 691, n.

Every disposition under the act is to be effected by some one of the assurances, (not being a will,) by which the Tenant in Tail could have made the disposition if his estate were an estate at law in fee simple, provided that it be made or evidenced by deed; and do not rest only in contract; and if the tenant in tail be a married woman, her husband must concur, and the deed must be * acknowledged by her as after directed. (s. 40.) And the deed, (unless in the case of a lease for 21 years or less, and at

[* See s. 77, &c., stated above, 66, 2 n.]

the Estate Tail converted into a Fee Simple, is a *common recovery; of which some slight mention has been made already. The efficacy of this Assurance, for the purposes just stated, depends entirely on the doctrine of Warranty, and on such a bold application of that doctrine, as no Court of Justice, under the control of due responsibility, would have ventured originally to make. It may, however, without much exaggeration, be affirmed, that in the reign of Edward the 4th the principal enactment of the Statute de Donis was repealed by a judicial sentence.

(105. 490. 615.)

2 Bl. Com. 117. 357. See Hallam, Const. Hist. *sub. init.*

(683.) The contrivance, in its simplest form, is this. A Writ of entry is brought against the Tenant in Tail. To give more latitude for fiction, this Writ is of the kind denominated "in the Post;" in which, though it be necessary to allege a disseisin or act of wrong, yet the Title of the Tenant is not deduced with particularity from the supposed Disseissor, but it is merely asserted that he had no entry into the Tenement but *after* the disseisin. The Tenant in Tail, thus brought before the Court, *vouches* a person appointed for that purpose,

(773.)

Cru. Rec. 17

3 Bl. Comm. 182.

Cru. Rec. 12.

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not less than five-sixths of a rack rent, and to commence at not more than 12 calendar months from the date,) must be inrolled in Chancery * within six calendar months after the execution. (s. 41.)]

[141.]

[* And if the disposition be by Bargain and Sale, it shall be good if so inrolled, though not inrolled within the time prescribed by 27 H. 8, c. 16, which, it will be remembered, is understood to be six *lunar* months.]

whom he pretends to have warranted the Tenements to him, and to be therefore bound, either to defend his Title for him, or to give him other Tenements of equal value. This Vouchee appears, and confesses the Warranty, and so takes the whole Burden of the Action upon himself. Then the Cause is adjourned to another day; upon which the Vouchee takes care to absent himself. The consequence is, that Judgment must go by default: first, for the Demandant against the Tenant in Tail; and secondly, for the Tenant in Tail against the Vouchee. (684) The first Judgment gives the Estate in fee simple to the Demandant, and is attended with a Writ to the Sheriff, by virtue of which he is to be put in seisin of the Tenements. This Writ is never actually executed by the Sheriff, but it is recorded with the other proceedings as having been executed, which comes to the same thing; and thus the Demandant becomes *seised* of the Tenements in fee simple, so that the Uses to which he was to be seised by agreement of the parties may be converted into legal Estates by the Statute. The second Judgment for ever establishes the first, by precluding all future claims under the entail. It directs that the Tenant in Tail be recompensed, to the value of what he has lost, out of the lands of the Vouchee; and as this recompence will descend to the heirs and devolve to the persons in remainder in the same manner as the Tenements would for which it is substituted,

(64, 319. 591.)

Cru. Rec. 122.

Cru. Rec. 151.

5 T. R. 179, 180. 181.

(169.)

3 Bl. Comm. 193.

Co. Litt. 252. a.

those persons are deprived of all reasonable ground of complaint; except that which the Court must necessarily refuse to hear, namely, that the whole proceeding is a mere artifice, that the Warranty is fictitious and the Recompence in Value imaginary. (685.) Such objections have long been antiquated: the Vouchee is an Officer of the Court, who is well known to have no lands; and the Recovery is confessed to be a Common Assurance, introduced for the purpose of cutting off entails, with all their pernicious consequences, and of making real property saleable, or disposable for the convenience of families. And therefore, although it
2 Salk. 569; Pig. Rec. 13, 14. is held that the Recompence (supposing it to be real,) would not extend to the *Reversion*, nor to a Remainder for years, nor to contingent interests, the Judges have always refused to take notice of these defects in the foundation of
Dormer's Case, 5 Co. 40. their building. And though the Writ of En-
(615.) try is not generally applicable to incorporeal Tenements, yet such are allowed to be included in it for the purpose of suffering a Recovery.

Machil v Clark, 1 Salk. 619. (686.) And yet, if there have been any change in the estate, so that the Tenant is not seised of
[See 682, n.] his estate tail according to the original gift, but of some other estate, (which must happen where there has been a Discontinuance and a restora-
(676.) tion of the seisin, but no remitter,) this will prevent the Recovery above described from affect-
Cru. Rec. 246, 247. ing the original entail. And the reason assigned

for this is, that the Recompence in Value will follow the course of devolution of the estate of which the Tenant was seised at the time of the Recovery, which may be very different from the course marked out by the gift. A like objection occurs where the party's estate tail is separated from his freehold by an intervening remainder of freehold; in which case also he cannot be said to be actually seised of an estate tail, for it is vested in him only as a remainder. (687.) To obviate these inconveniences, it has become usual, and is indeed the constant practice, to make the Tenant in Tail himself appear before the Court in the quality of a Vouchee, which does not hinder him from afterwards vouching the Officer of the Court (who is called the Common Vouchee) in the manner above mentioned. The doctrine in which this practice has originated seems to amount to this: When in a Real Action a person is vouched to Warranty, he becomes, for the purposes of the Action and in contemplation of Law, the actual Tenant of the land. A fictitious freehold is thus vested in the Vouchee; and in the cases under our consideration, by uniting with his right or his remainder, confers on him that immediate seisin of an estate tail which the purpose requires. And therefore by *vouching* the apparent Tenant in Tail, instead of bringing the Writ immediately against him, a certainty is obtained that the Recompence in value to be exacted from the Common Vouchee will flow in

Co. Litt. 265. b.

the channel of the original entail. (688.) But whatever be the reason, it is settled that the Vouchee submits all his rights in the lands to the operation of the Recovery; which being thus suffered is called a Recovery with Double Voucher, and for its superior efficacy has become the usual form of the Assurance. (689.) In order that the Tenant in Tail may be vouched, it is necessary that the immediate Freehold should be vested in some other person, against whom the Writ of Entry may be brought; or in legal language, that a Tenant to the Præcipe should be created. This is generally effected by Lease and Release, or by Bargain and Sale enrolled; and it is usual to declare the Uses of the Recovery by the same Instrument which transfers the preparatory Freehold. (690.) From the nature of the transaction it was formerly necessary that the Tenant to the Præcipe should be constituted, at the latest, before Judgment was given in the Recovery: but now by St. 14 G. 2, c. 20, s. 6, it is sufficient if the freehold be conveyed to him at any time during the Term in which the Recovery is suffered (*a*). (691.) And by s. 1, of the same Statute, where the imme-

Cru. Rec. 252.

Cru. Rec. 21.

Cru. Rec. 25.

Goodtitle, *v.* Rigby, 5 T. R. 177.

[3 & 4 W. 4, c. 74.]

[(*a*) By s. 11 of the late Act, no Recovery shall be invalid, in consequence of any person in whom a legal estate was outstanding having omitted to make the tenant to the writ of entry; provided the owner of an estate in possession, not less than an estate for life or lives, in the rents and profits, conveyed such estate, within the proper time, to the tenant to the writ.]

diate Freeholder is a mere lessee for life under a Rent, his concurrence is made unnecessary; but still if the estate tail be preceded by an estate of freehold besides that of the lessee, none but the owner of this estate, (or of the first such estate, if there be more than one,) can make a good Tenant to the Præcipe (*a*).

[(*a*) This rule, though originating in the legal doctrines respecting Recoveries, was in practice of great utility in protecting family estates in settlement from the improvidence of the tenant in tail; inasmuch as the concurrence of the tenant for life, (generally the father,) was necessary, in order to make an effectual disposition of the estate. This useful protection is effectually preserved by the late act, by constituting the owner of such prior estate *Protector of the settlement*, and making his consent necessary to a complete disposition of the lands settled.

By s. 22, the owner of an estate* for years determinable on a life or lives, or any greater estate, (not being an estate for years†,) under the entailing settlement‡, prior to the estate tail, or of the first of such prior estates, (if more than one,) shall be the Protector of the settlement so far as regards the lands in which such prior estate subsists; and that, although the prior estate be charged or incumbered or absolutely disposed of by the owner, or by his bankruptcy or insolvency; and an estate by the curtesy in respect of the estate tail, or of any prior estate under the settlement, shall be deemed a prior estate; and a resulting

[* Whether at law or in equity. See s. 1.]

[† Nor being, it would seem, itself an estate tail.]

[‡ Every assurance by which lands are entailed or agreed or directed to be entailed, shall be deemed a *settlement:* and every appointment under a power in a settlement, or under any power arising out of a power in a settlement, shall be considered as part of such settlement; and where made by will, the time of the testator's death shall be considered the time when the settlement was made. See s. 1.]

[Re Blewitt, 3 M. & K. 250; Re Wood, 3 M. & C. 266.]

Taylor v. Horde, 1 Burr. 60.

(692.) And it seems that if in any case the

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use or trust to or for the settlor, shall be deemed an estate under the settlement; and so, (by s. 25,) shall any estate confirmed or restored by the settlement, except a lease at a rent.

By s. 23, where there are two or more owners of the prior estate, each shall be Protector as to his undivided share.

By s. 24, where a married woman would, if single, be Protector, if the prior estate be not to her separate use, she and her husband together shall be the Protector; if it be to her separate use, she alone shall be the Protector.

By ss. 26, 27, no person in whose favour a lease at a rent shall be created or confirmed by the settlement, and no bare trustee, tenant in dower, heir, executor, administrator, or assign, (except a bare trustee under a settlement, made on or before the 31st of December, 1833,*) shall as such be the Protector. And where the owner of the prior estate is excluded by either of these two clauses, the person (if any) who if such prior estate did not exist would be the Protector, shall be such Protector. (s. 28.)

By s. 32, the settlor is empowered to appoint any persons

[28 Aug. 1833.] [* By s. 31, where under a settlement made *before the passing of the act*, the person who would have been the proper person to make the tenant to the writ of entry, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him such right, be the Protector. Also, by s. 29, where on or before the 31st of December, 1833, an estate under a settlement shall have been disposed of, the person who in respect of such estate would have been the proper person to have made the tenant to the writ of entry, shall, during the continuance of the estate conferring the right, be the Protector of the settlement:—and, by s. 30, where any person, having on or before that day disposed of, or created an estate out of, a remainder or reversion in fee, would but for this section have been the Protector, and so enabled to concur in barring the remainder or reversion, which he could not otherwise have done,—the proper party to have made the tenant to the writ of entry, shall, during the continuance of the estate conferring such right, be the Protector.]

Freehold be acquired for the purpose by dis-

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to be Protector of the settlement, *in lieu* of the person who would otherwise be Protector, for the whole or any part of the period for which such person would have continued Protector; and, by inserting a power in the settlement, to perpetuate such substitutionary protectorship during the whole or any part of such period: the persons so appointed are never to exceed three, and are not to be aliens; and every deed appointing a Protector under a power in a settlement, or by which a Protector relinquishes his office, must be inrolled in Chancery within six calendar months after the execution. And the person who would otherwise have been sole Protector, may be one of the persons appointed under this section.

By s. 33, where the Protector is lunatic, idiot, or of unsound mind, the †Lord Chancellor, or other person entrusted with the care of lunatics, shall be Protector: and if the Protector be convicted of treason or felony, or, if any person, not being the owner of a prior estate under the settlement, is Protector and is an infant, or it is uncertain whether such last-mentioned person is living or dead, the Court of Chancery shall be Protector in lieu of such * infant or unascertained person; or if the settlor declares that the owner of a sufficient prior estate shall not be Protector, and does not appoint any person Protector in his stead, or if in any other case there shall be a sufficient prior estate and no Protector, the Court of Chancery shall be Protector.

By s. 34, the consent of the Protector (if any) is requisite, to enable an *actual tenant in tail* not entitled to the immediate remainder or reversion in fee, to dispose of the lands entailed to the full extent authorized by the act: but he [682, n.]
may, without such consent, make a disposition which shall be good against all persons claiming by force of the estate tail.

And by s. 35, when an estate tail has been converted

[† As to the principles upon which the Lord Chancellor will act as Protector, see *Re Newman*, 2 My. & Cr. 112; and see too above, 691, n. † *marg.*]

[* The case of the convicted person seems to be omitted here by mistake.]

seising the owner, this will vitiate the Recovery*.

* (692. *n.*) The Case of *Taylor* v. *Horde* was thus: Tenant in Tail in remainder expectant upon the Estate for life of a Jointuress, brought an Ejectment against that Tenant for life, and obtained a Verdict, Judgment and Writ of Execution in his favour; and afterwards, being in pos-

into a base fee, the consent of the Protector, if any, is requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to make a disposition under s. 19, (above, 682, n.)

Any device to control the Protector in giving his consent, and any agreement by him to withhold his consent, shall be void: and he shall not be deemed a trustee, or under the control of a Court of Equity, in respect of his consent; and the rules of Equity, as to dealings and transactions between a donee of a power and the object of it, shall not apply as between Protector and Tenant in Tail. (ss. 36, 37.) [See 571, n.]

The Protector's consent must be given either by the same assurance by which the disposition is effected, or by a distinct deed, executed on or before the day on which the assurance is made, (s. 42,) and inrolled in Chancery, before or at the time of the inrolment of the assurance. (s. 46.)

If the consent be given by a distinct deed, it shall be considered an unqualified consent, unless the Protector refer to and confine his consent to a particular disposition. (s. 43.)

The consent is irrevocable; (s. 44;) and a married woman may, whether alone or jointly with her husband, consent as if sole. (s. 45.)

And by s. 47, Courts of Equity are excluded from giving any effect to dispositions or consents under the act, which would not be effectual in a Court of Law; and it is declared, that no disposition or consent, when the estate tail is equitable, shall be of force, unless such disposition or consent would in case of an estate tail at Law be an effectual disposition or consent in a Court of Law.]

(693.) By s. 4 of the last-mentioned Statute, reciting that sometimes by neglect Recoveries are not entered upon Record, it is provided, That where any person shall purchase, for a valuable consideration, any estate in Lands, &c. whereof a Recovery is necessary to be suffered in order to complete the Title, he and all claiming under him, having been in possession from

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session accordingly, made a Tenant to the Præcipe by Feoffment, and suffered a Recovery. After this Recovery (408.)
the Jointuress, by means of a new Ejectment, was restored to her estate. The question which ultimately arose was, whether in the Recovery there was a good Tenant to the Præcipe, *i. e.* a person actually seised of the Freehold; (for the mere wrongfulness of the seisin would not vitiate the Assurance:) and it was held that there was not such a Tenant, because the possession under the first Ejectment did not amount to a Seisin of the Freehold, nor was such Seisin acquired and conferred by the Feoffment. The former of these two positions seems to have been more generally acquiesced in than the latter, but perhaps without being supported by any stronger reason. An Ejectment is now the ordinary mode of trying a title to a Freehold estate; where it is adopted for that purpose the question between the parties is, which of them shall have the possession of that estate; that is, who shall be *seised of the Freehold;* and if the action do not determine this, it seems to determine nothing. The second position has been commonly thought to have been refuted by Mr. Butler;(in note 1 to Co. Litt. 330. b.;) but in the late Case of *Doe* v. *Lynes*, (3 B. & C. 388, 405, 406,) it seems to have been revived. Independently, however, of both these positions, the Case of *Taylor* v. *Horde* may be considered as authorizing the assertion in the text, on the ground that no person shall be allowed to take advantage of his own wrong.

the time of such purchase for twenty years, may prove a Recovery of which no Record can be found, or which appears not to be regularly entered on Record, to have been duly suffered, by the production of a Deed making a Tenant to the Præcipe, and declaring the uses of a Recovery, and executed by a person having a sufficient estate for the purpose. (694.) And by s. 6, every Recovery twenty years old, to which the persons having power to bar the entail were parties, is made sufficient evidence of a * Deed by which the Tenant to the Præcipe was constituted, though no other traces of such Deed appear (*a*).

1 Prest.Conv 1. (15.) (695.) The effect of a Common Recovery is to convert the estate tail on which it operates into a Fee Simple, as absolute as that out of which it was at first derived. The Recovery must therefore defeat not only the remainders and reversion which are expectant on the natural expiration of the estate tail, but also all

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* (694, *n.*) This has been justly held to extend to a case where the Tenant to the Præcipe appeared to have been made by Lease and Release, and the Release was produced, but not the Lease; upon which it is to be observed, that the aid of the Statute was required, because a person claiming under the entail would not be bound by the recital of the Lease in the Release, as not deriving (481.) his title merely from the Releasor. *Holmes* v. *Ailsbie*, 1 Madd. 551.

[3 & 4 W. 4. c. 74.] [(*a*) By s. 10 of the late act, no Recovery shall be invalid in consequence of the neglect to inrol in due time the Bargain and Sale, making the tenant to the writ.]

Shifting Uses or Executory Devises to which, as destructive casualties, it was subjected in its creation(*a*). (696.) It is laid down by Lord Holt, that "if the Donor reserve a *rent*, with a *condition* to re-enter (on non-payment,) a Recovery will not bar it;" that being "a condition that runs with the land," in contradistinction to "a collateral condition," giving a right of re-entry "for non-payment of a sum in gross." It would perhaps be difficult to find another instance of a Condition so inherent to the land as not to be destroyed by the Recovery of Tenant in Tail in possession, whose estate was created at the same time with the Condition. (697.) A Condition not to alien the estate though not absolutely void, (for it converts what would otherwise be a Discontinuance into a forfeiture,) is of no avail against a Recovery, nor against a Fine with Proclamations.

2 Salk. 570.

Litt. 362, 363. 364. (26, 671.)

Co. Lit. 224. a.; 1 Burr. 84; Cru. Fi. 194.

(698.) For a Fine levied by Tenant in Tail, whether in possession or remainder, is not without its effect. By the Statute de Donis indeed such a Fine is declared to be void; yet when applied to lands of which the Conusor was actually seised in Tail, it has been always held to be a Discontinuance. Under the Statute of 4 H. 7, it was considered doubtful whether the heirs to an entail were included in the denomi-

Co.Litt. 332.b.

[(*a*) And so now the disposition under the Act by Tenant in Tail, if made with the necessary consents, (if any,) will defeat all estates which are to take effect after the determination or in defeasance of the estate tail. See above, 682, n., 691, n.]

nation of Privies to the Fine of their ancestor.
(79. n.) But this doubt was removed by St. 32 H. 8, c. 36, which declares a Fine levied with Proclamations according to the former Statute, by any person of full age, of lands or tenements before in anywise entailed to him or to any of his ancestors in possession, reversion or remainder, to be a sufficient bar and discharge for ever against him and * his heirs, claiming only by force of such entail.

(671, 672.) (700.) The effect of a Fine upon the remainders or reversion is not altered by this Statute. Cru. Fi. 194. 195. If therefore Tenant in Tail of an incorporeal tenement in possession or remainder, or of land in remainder, levy a Fine, the ulterior estate in remainder or reversion are not affected; and hence the estate transferred is of a peculiar kind, being a qualified or (b) base fee, differing

* (699.) The extensive import of these words has been restrained by a decision, that if a person (a) capable of inheriting an estate tail levies a Fine of the lands, and dies before the estate can descend to him, his issue alone, as representing him, are barred; (see *Grant's Case,* Cru. Fi. 182;) while his Brother or other collateral heir may still succeed to the estate. *Macwilliam's Case,* Hobb. 332.

[3 & 4 W. 4, c. 74.] [(a) But the issue in tail has no power, under the late Act, to dispose of his expectant interest, even as against his own issue. See s. 20.]

[(b) And now, if the Protector withholds his consent, the Tenant in Tail in remainder may still dispose of his estate as a base fee. (s. 34, above, 691, n.)

[3 & 4 W. 4, c. 27.] And by the late Statute for Limitation of Actions, s. 23,

from a fee simple in this respect only, that its duration will have the same limit as the estate of the Tenant in Tail would have had if no such alienation had been made, which will necessarily cease on the Conusor's death without issue inheritable according to the entail. (701.) On the other hand, if Tenant in Tail of land in possession levy a Fine, without the concurrence of the person in remainder or reversion, he at the same time bars his own heirs, and discontinues the ulterior interests, which will also eventually be barred, unless recovered by a Formedon, brought within five years after the right of possession shall accrue. (702.) But whether the Estate Tail lie in grant or in Livery, if the immediate reversion or remainder in fee simple happen to be vested in the Conusor himself, or in one of several Conusors, or in the Conusee, the determinable fee into which the Estate Tail is converted by the Fine will be (674, 698, 89.) [See 682, n.]

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when a tenant in tail shall have made an assurance which shall not bar an estate to take effect after or in defeasance of the estate tail, and the land shall have been enjoyed by some person other than a person entitled in respect of any estate to take effect after or in defeasance of the estate tail, for twenty years after the time at which such assurance, if then made, would, without the consent of any other person, have barred such estate; then, after such twenty years, the assurance shall be effectual as against any person claiming any such estate.

So that if the land be enjoyed under the disposition for twenty years after there has ceased to be a Protector, the base fee will be enlarged.]

(*a*) merged in the ulterior absolute fee; and thus what was at first a reversion or remainder in remote expectancy will become an estate in
Cru. Fi. 269. possession. (703.) And here the difference between the operations of a Fine and of a Recovery is very observable; for a Recovery would have converted the Estate Tail into a Fee Simple, and destroyed the expectant estate; while a Fine on the contrary destroys the Estate Tail, and gives the immediate enjoyment of the expectancy; and this difference is not merely theoretical; for if the estates have been transmitted by descent, any incumbrance made by the ancestor, which upon his death must have dropped off from the Estate Tail, would still adhere to the ulterior Fee Simple, and together with it would either be cut off by the Recovery, or established in immediate right by the Fine (*b*).

[3 & 4 W. 4, c. 74.] [(*a*) But by the late act, s. 39, it is declared, that when after the passing of the act, a base fee and the immediate remainder or reversion in fee shall be united in the same person, the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the Protector, if any, might have created, if the remainder or reversion had been in any other person.]

[(*b*) It may here be observed, that, in accordance with the general power of disposition given to Tenant in Tail by St. 3 & 4 W. 4, c. 74; the late Statute for Limitation of Actions, 3 & 4 W. 4, c. 27, declares, that when a tenant in tail is barred by reason of his not having made his entry or
[See 370, n.] brought his action within the period limited by the act, all persons claiming estates which he might have barred, shall

(704.) Though an entail cannot be discontinued but by the person seised in tail under it; yet, if Tenant in Tail in possession convey the land to another by Lease and Release, and at the same time covenant with him to levy a Fine, this Fine being afterwards levied makes a Discontinuance; for the Lease and Release and Fine are all, to this intent, considered as one Assurance, in which the Fine has the principal operation. (705.) And it would seem that this operation is to be regarded as commencing from the execution of the prior conveyance; for it has been held that where Tenant in Tail, having created a Tenant to the Præcipe for the purpose of suffering a Recovery, made his Will relating to the same lands, and then suffered the Recovery, the devise was originally valid, and stood unrevoked.

(671.) Doe v. Whitehead, 2 Burr. 704. King v. Edwards, Cro. Car. 320.

Selwyn v. Selwyn, 2Burr. 1131; Fearne, C. R. 368.

(255. 267.)

(706.) A Fine levied by Tenant in Tail does not prevent him from afterwards being vouched, and vouching the Common Vouchee in a distinct independent Recovery, which will be effectual against the persons in remainder and reversion. And it seems to follow that if he die without suffering a Recovery, the privilege descends to his heir under the entail; for the

2 Atk. 201; Hob. 263.

See 1 Prest. Conv. 126. 139. 317.

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be barred also. (s. 21.) And after his death within such period, the time shall run on against all persons whom he might have barred. (s. 22.) Also, as we shall see, a judgment against him will bind all whom he might have barred.] [873, n. (a).]

Fine cannot bar the heir more completely than
Prest.Touchst. 319,329;Goodright v. Mead, 3 Burr. 1703. it did the Conusor himself. The Recovery, however, can only operate to amplify and render absolute the qualified Fee which passed by the Fine (*a*).

Co.Litt.372.b. [D. of Grafton v. L.& B. Railway, Co. 5 Bing.N.C.27.] (707.) Tenant in Tail, by the gift or provision of the Crown in reward of services, cannot, while a remainder or reversion subsists in the Crown, by Fine or Recovery, bar the entail even against his own issue (*b*). This restriction was introduced by St. 34 & 35 H. 8, c. 20; but a remainder or reversion vested in the Crown could never in any case be cut off, discontinued or divested.

(698.) (708.) By (*c*) St. 11 H. 7, c. 20, confirmed by

[3 & 4 W. 4, c. 74.] [(*a*) By section 38, where a tenant in tail has made a voidable estate for valuable consideration, and afterwards makes a disposition under the act, (other than a lease not requiring inrolment,) such disposition, whatever its object, and whatever the estate created by it, shall, if made with the consent of the Protector, (if any,) or if there be no Protector, have the effect of confirming the voidable estate to its full extent as against all persons except those whose rights are saved by the act; but if there be a Protector and he does not consent, the voidable estate shall be confirmed so far as such tenant in tail would be capable of confirming the same without such consent:—provided, that such voidable estate shall not be confirmed as against a purchaser for valuable consideration without notice thereof.]

[(*b*) Nor can he now by disposition under the late act. (s. 13.)]

[(*c*) In any settlement under this Statute, made before the passing of the late act, the same concurrence as was re-

the before mentioned St. 32 H. 8, c. 36, the alienation by a Widow, (whether remaining sole or with an after-taken husband,) of an estate tail, provided for her Jointure by her husband or any of his ancestors, is made void, and a forfeiture for the benefit of the person who would be entitled to enter if she were dead; unless that person concur in the alienation by some instrument recorded or enrolled. An alienation merely for the term of the Widow's own life is excepted in the Statute; and it is provided that if the alienation be made with a second husband, she may enter and enjoy the lands after his death according to her first estate; but this, it is conceived, cannot be applicable to an alienation by Fine or Recovery, to which she is capable of consenting. See Litt. 731. [Sed quære; see the act.]

(709.) It has been held, where the estate given to the woman was in tail general, with remainder not to the husband or his heirs, but to a stranger, that the case was not within the intention of the Statute, and therefore an alienation by the Widow and her second husband was valid; but it seems that in the case so decided there were no children by the first husband, who might inherit the estate tail. (710.) And on the other hand, upon the presumed in- Foster v Pitfall, Cro. El. 2. Co. Litt. 365.b.

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quired by the Statute is necessary to enable the widow to make a disposition under the late act. Except as to lands comprised in any such settlement, St. 11 H. 7, c. 20, is repealed. (ss. 16. 17.)]

tention of the Statute to establish a Settlement for the benefit of the issue of the marriage, it was once extended by a forced construction to set aside an alienation made by the wife with her first husband; but this decision has been overruled.

Kirkman v. Thompson, Cro. Jac. 474.

(711.) (*a*) By s. 65, of the late Bankrupt Act,

[3 & 4 W. 4, c. 74.]

[241, n.]

[682, n.*]

[691, n.]

(691, n.)

[(*a*) This is now repealed by section 55 of the late act; and section 56 enacts, that the Commissioner under any fiat issued since the 31st of December, 1833, where the bankrupt is actual tenant in tail of lands of any tenure, shall dispose of the lands for the benefit of the creditors, and shall create by such disposition as large an estate as the actual tenant in tail could have done if not bankrupt; provided, that if there is a Protector, and he does not consent to the disposition, the estate so created shall be as large as the tenant in tail, if not bankrupt, could have created without such consent. And by section 57, when the bankrupt is entitled to a base fee in lands of any tenure, the Commissioner shall dispose of the lands, provided there be no Protector: and the base fee shall be thereby enlarged into as large an estate as the same could have been enlarged into by the person so entitled, if not bankrupt. And in the case of the bankrupt being tenant in tail, or entitled to a base fee, where there is a Protector, the Commissioner is to stand in the bankrupt's place, so far as regards the consent of the Protector; and the previous clauses respecting such consent shall, as to lands not of Copyhold tenure, be applicable; (s. 58;). and the deed of disposition of such lands must be inrolled in Chancery within six calendar months. (s. 64.)

And by section 60, where, from want of consent of the Protector, a base fee only has been created by the disposition of the Commissioner, if at any time during the continuance of the base fee there shall cease to be a Protector, the base fee shall be enlarged into the same estate, into which

(St. 6 G. 4, c. 16,) "The Commissioners shall
"by Deed indented and enrolled as aforesaid, (242.)
"make sale for the benefit of the Creditors as
"aforesaid of any Lands, Tenements, and Here-
"ditaments situate either in England or Ireland,
"whereof the Bankrupt is seised of any Estate
"Tail in possession, reversion or remainder,

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the same could have been enlarged, if at the time of the disposition there had been no Protector. And by section 61, where the bankrupt is entitled to a base fee and there is a Protector, and the lands are sold or conveyed under the Bankrupt Acts, if at any time during the continuance of (241, & n.) the base fee there shall cease to be a Protector, the base fee shall be enlarged into the same estate into which the same could have been enlarged, if at the time of adjudication of bankruptcy there had been no Protector, and the disposition had been made under this act.

And by section 62, a voidable estate created for valuable consideration before the bankruptcy, shall be confirmed by the disposition of the Commissioners, if there be no Protector, or if there be, with his consent, or on there ceasing to be one; but not as against a purchaser for valuable consideration, without notice of the voidable estate. All acts of the bankrupt tenant in tail or entitled to a base fee, which, if he had been seised in fee, would have been void against the assignees, shall be void against the Commissioner's disposition. (s. 63.) But, subject to the powers of disposition so given to the Commissioner, and to the estate which may be vested in the assignees, and to the rights of persons claiming under them, the bankrupt tenant in tail or entitled to a base fee, shall have the same powers of disposition under the act, as if he had not become bankrupt. (s. 64.)

Section 65, gives effect to the disposition of the Commissioner though the bankrupt be dead, in certain cases there specified.]

" and whereof no reversion or remainder is in
(707.) " the Crown, the gift or provision of the Crown; " and every such Deed shall be good against " the said Bankrupt and the issue of his body, " and against all persons claiming under him " after he became Bankrupt, and against all " persons whom the said Bankrupt by Fine, " Common Recovery, or any other means, might " cut off or debar from any remainder, rever- " sion or other interest in or out of any of the " said Lands, Tenements, and Hereditaments."

Jervis v. Tayleur, 3 B. & A. 557.

(712.) It has been held that under the similar enactment of 21 Jac. 1, c. 19, s. 12, a Commission being issued jointly against the Tenant for life in possession, and the Tenant in tail in remainder, (who happened to be partners in trade,) the Commissioners' Deed had not the effect of a recovery, but operated separately upon each estate like a Fine.

Pre. Cha. 390. (215.)

(713.) Another Statute, that of 43 El. c. 4, is construed to enable Tenants in Tail to dispose of their estates for charitable purposes without Fine or Recovery.

Co. Litt. 45. b. 46. b.

(714.) Tenant in Tail was always allowed to make leases for any term of years; which during his own life would be valid and indefeasible; and after his death, if the estate tail continued, would still subsist unless defeated by the entry of the heir; who, if instead of entering he accepted rent from the lessee, placed himself in the situation of the lessor.

Machil v Clark, 2 Salk. 619;

(715.) So a Grant (of things lying in Grant),

a Covenant to stand seised (where the proper consideration exists), a Bargain and Sale, or Lease and Release, by Tenant in Tail to a person and his heirs, gives him a qualified or base Fee, commensurate with the Estate Tail, and capable of being rendered absolute, but in the mean while defeasible by the entry, not only of the person in remainder or reversion, when his turn of possession shall arrive, but of the heir to the entail upon the grantor's death (*a*). If, however, the Tenant in Tail have aliened the Tenement for the term of his own life, he has then nothing more to give by such means.

Goodright *v.* Mead, 3 Burr. 1703.

(716.) (*b*) The Leases, made by Indenture, of Tenant in Tail of full age, are rendered absolutely valid by the St. 32 H. 8, c. 28, under the following conditions contained in s. 2. (217. 237.)

"Provided always, That this Act, or any "thing herein contained, shall not extend to any "Leases to be made of any Manors, Lands, "Tenements or Hereditaments, being in the "hands of any Fermor or Fermors by virtue of "any old Lease, unless the same old Lease be

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[(*a*) See the provision made by the late act, s. 38, (above, 706, n.) for confirmation of voidable estates created by tenant in tail.] [3 & 4 W. 4, c. 74.]

[(*b*) Tenant in tail may now, by disposition under the act, with the necessary consents, if any, make leases for any term of years, and unrestrained by any conditions. And even if the lease be made by such disposition, but without the necessary consents, it will be good against the issue in tail. See ss. 15, 34; above, 682, n., 691, n.]

" expired, surrendered or ended within one year " next after the making of the said new Lease; " nor shall extend to any Grant * to be made " of any Reversion of any manors, lands, tene- " ments or hereditaments, nor to any Lease of " any manors, lands, tenements, or heredita- " ments, which have not most commonly † been " letten to Ferm, or occupied by the Fermors " thereof, by the space of twenty years next " before such Lease thereof made; nor to any " Lease to be made without ‡ impeachment of

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* (716. *n.*) This general prohibition of a reversionary grant, must necessarily be understood with an exception of the case immediately preceding. See Co. Litt. 44. a, b.; 4 Bac. Ab. 67, 68. As to the manner in which the old lease may be ended, see *Grumbrell* v. *Roper*, 3 B. & A. 711. And in what cases a surrender may now be made for this purpose by a person who has not the immediate right of possession, see St. 4 G. 2, c. 28, s. 6. And as to Surrenders generally, see chap. 3, sect. 2.

† (717.) This is understood to mean, that the land must have been in lease (whether uninterruptedly or at intervals) during more than half of the twenty years; and the letting must have been by some person seised of an estate of inheritance. Co. Litt. 44. b.

‡ (718.) Waste is the destruction or material alteration of things forming an essential part of the inheritance, as Houses, Timber, &c. So, the opening of New Mines is Waste, but not the working of old ones. It is Waste to build a new House, and to pull it down again is Waste also. These are acts of *Voluntary Waste,* while the neglect of repairs is called *Permissive Waste.* Co. Litt. 53. Tenant for life or years is bound to avoid both kinds; but his estate may, by Deed, (9 Co. 10. b.) be made without

" waste, nor to any Lease to be made above " the number of twenty-one years,* or three " lives, at the most, from the day of making " thereof; and that upon every such Lease " there be reserved yearly during the same " Lease, due and payable to the Lessors, their " heirs and successors, to whom the same " Lands should have come after the deaths of " the Lessors, if no such Lease had been thereof " made, and to whom the Reversion thereof " shall appertain, according to their Estates " and interests, so much † yearly Ferm or Rent,

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impeachment of Waste, and then he may cut timber for his own benefit, (*Lewis Bowles's Case*, 11 Co. 79, b. 82. b.) which otherwise he could only do for necessary repairs, or other purposes for which the Law grants him *Estovers*. Co. Litt. 41. b. The Action of Waste at Common Law can only be brought by a person who has an estate of inheritance in *immediate* expectancy upon the devastator's estate; and therefore a lease to one for life, with remainder to another for life, is not sanctioned by this Statute. Co. Litt. 44. b.

* (719.) The lease must be either for a term of years not exceeding twenty-one, or for one, two, or three lives only: the two periods cannot be combined. Co. Litt. 44. b.

† (720.) On splitting a Farm the old rent may be apportioned. See *Doe* v. *Wilson*, 5 B. & A. 363. But it has been held that where new lands are added with a proportionate addition of rent, the terms of the Statute are not complied with. If any profit, not coming under the denomination of yearly rent, were reserved by the old leases, it may yet be omitted in the new; and, so that the rent

"or more, as hath been most accustomably "yeelden or paid for the manors, lands, tene "ments and hereditaments, so to be letten "within twenty years next before such Lease "thereof made; and that every such person "and persons, to whom the reversion of such "manors, lands, tenements or hereditaments so "to be letten shall appertain, as is aforesaid, "after the deaths of such Lessors, or their heirs, "shall and may have such like remedy and "advantage to all intents and purposes, against "the Lessees thereof, their executors and "assigns, as the same Lessor should or might "have had against the same Lessees. So that "if the Lessor were seised of any special Estate "tail of the same hereditaments at the time of "such Lease, that the Issue or Heir of that "special Estate shall have the reversion, rents, "and services reserved upon such Lease after "the death of the said Lessor, as the Lessor "himself might or ought to have had if he "had lived."

Co. Litt. 45. b. (721.) It has been held that this Statute does not extend its protection to the lessees against [See 716, n.] the persons in remainder or reversion after the expiration of the Estate Tail.

Co. Litt. 27. b. (722.) It is necessary to observe, that nothing which has been said concerning the alienation

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reserved be annual, it is not necessary to retain the old subdivisions by quarterly or half-yearly days of payment. Co. Litt. 44. b.

of Estates Tail, is to be extended to the Estate of that particular Proprietor who is called "Tenant in Tail after possibility of issue extinct" (*a*). When it becomes impossible that any person should exist to whom the inheritance under the entail can descend, the inheritance itself ceases. But this impossibility can only arise, in contemplation of law, by the death of one of the persons from whom the inheritable issue is to proceed. Thus, if lands be given to *A.*, and the heirs of his body by *B.* his wife, or to *A.* and *B.* and the heirs of their bodies, and *B.* die, and there be no issue of their two bodies living; *A.* from Tenant in Tail special, becomes Tenant in Tail after possibility of issue extinct; and has nothing more in effect, than an estate for his own life, attended with certain privileges, the relics of his former inheritance; the principal of which is the right of committing waste. And if he alien his estate, the privileges cease.

See Williams *v.* Williams. 12 East 209.
(718)
Co. Litt. 28. b.

[(*a*) The power of disposition given by the late act, does not extend to tenants in tail after possibility of issue extinct. (s. 18.)] [3 &4 W. 4, c. 74.]

CHAP. III.

OF ESTATES FOR LIFE.

SECT. 1.—*Of the various kinds of Estates for Life.*

(17.) (723.) IT was said that an Estate of Freehold, (not amounting to an inheritance,) was limited to the duration of some person's life, or to some uncertain period included in such life, and not referred to the mere will of the next person in succession. This definition requires to be more fully developed.

The Estates of Tenant by the Curtesy, Tenant in Dower, and Tenant in Tail after possibility of issue extinct, are confined to the lives of the parties to whom the law originally assigns them. Similar to these is an Estate created by Lease, with Livery of seisin, (or by any other Conveyance at Common Law, which might be employed for transferring the fee simple,) or by Declaration of Use, or by Will, and expressly limited to a person for his own Life. (724.) But an estate may also be given to *A.* for the life of *B.*, or for the lives of *B.* and *C.*, or for any number of lives mentioned in the Grant, in which latter cases the estate is, in effect, for the life of the person who happens to survive the rest. So on the other hand, an estate for the *joint* lives of *B.* and *C.*, is confined to the life of him who dies first.

(725.) An Estate to a Widow during her Co. Litt. 42. a.
Widowhood, or to any person as long as he shall
dwell in such a house, or till he be promoted to a
benefice, is a Freehold, confined to an uncertain
period included in the party's life. So if lands Ib. & Plowd. 273.
in possession be given to *A.* until he have received 100*l.* out of the profits. (726.) But in
this last case, if the lands were in lease at a
fixed rent at the time of the grant, the certainty
of the period would have made the interest a
chattel. (727.) And for the like reason an
estate to *A.* during the minority of *B.* is also
a chattel; for a term is fixed beyond which the
estate cannot continue; the period therefore is
certain in itself, and only made uncertain by
being included in a life. (728.) There are indeed some uncertain periods, relating always to
the raising of money out of lands or tenements,
which for the sake of convenience are allowed
to constitute chattel interests; but when the
law determines that the uncertainty of duration
shall not cause the estate to be freehold, it also
excepts the case from the general rule that the
want of precise words of limitation shall be sup- (21.)
plied by confining the interest to the life of the
grantee; and thus our definition is saved whole,
for the uncertain period is not included, (unless
by accident,) within any person's life. Some
account of these anomalous estates will be given [866.]
in chapter 5.

(729.) If lands or tenements be given without any express limitation of estate, by means

(21. 511.) adequate to the transfer of a freehold, the law, as we have seen, creates an estate for the life of
Co. Litt. 42. a. the Grantee (*a*). But this is only where the Grantor may lawfully by such means create that estate; for if he be Tenant in Tail, such an
(673, 716.) indefinite lease with livery of seisin will pass only such estate as he may give without making a Discontinuance; that is, unless the requisitions of the Stat. 32 H. 8, c. 28, above mentioned, be complied with, an estate for the life of the lessor (*b*).

Co. Litt. 41.b. (730.) Anciently, when lands were given to *A.* for the life of *B.*, if *A.* or his assignee happened to die in *B.*'s lifetime, the estate belonged to the first person who could take possession, whoever he might be; and such person was called an Occupant. (731.) But if the Gift were to *A.* and his heirs for the life of *B.*, or if *A.* in the former case had assigned his estate to another person and his heirs, this title by occupancy was precluded. The heir indeed who succeeds to such an estate is commonly
3 P.Wms. 368. called a Special Occupant; but the better opi-

[(*a*) But if the disposition be by a will executed since the 1st of January, 1838, the devisee, as we have seen, will take the fee simple, or the whole estate of the Testator. See above, 284, n.]

[(*b*) But if it be by deed duly inrolled, it will be good for the life of the lessee, as against the issue in tail: and also, if the necessary consents be duly given, as against those in remainder or reversion. See above, 682, n., 691, n.]

nion seems to be that he takes by Descent; for the Estate, though not an Inheritance or Fee, (and therefore not subject to Curtesy or Dower, nor capable of being entailed,) is a Descendible Freehold. Litt. 739; 1 Atk. 480; 2 Bl. Rep. 1150; 7 V. J. 443.

(732.) If such an Estate be given to *A.* and the heirs of his body, it will descend, during its continuance, in the same manner as an Estate Tail, unless prevented by alienation; but this alienation may be made by any mode of conveyance, except perhaps by a Devise by Will: and it is settled that if there be an ulterior limitation of the same estate, analogous to a remainder expectant on the failure of *A.*'s issue, the alienation of *A.* (the *quasi* Tenant in Tail) will extend to this also. 1 Scho. & Lefr. 294. Fearne, C. R. 495.

(733.) It has also been held that the estate might be given to *A.*, his executors and administrators; these representatives, however, it is clear, must take it in the character of Special Occupants. And now by s. 12, of the Statute of Frauds (29 Car. 2, c. 3,) it has been enacted, 7 V. J. 448.

(*a*) "That any estate *pur auter vie* shall be

[(*a*) This Section of the Statute of Frauds, is repealed by St. 1 Vict. c. 26, which, however, enacts, (s. 3,) that the power of disposition by Will, thereby given, shall extend to " any estate *pur autre vie,* whether there shall or " shall not be a special occupant thereof*;" and it also, (s.

[* The act does not extend to any estate *pur autre vie* of any person who died before the 1st of January, 1838; (s. 34;) nor, as it will be remembered, to any will made before that day.] [P.105,n.(*b*).]

" devisable by a Will in writing, signed by the " party so devising the same, or by some other " person in his presence, and by his express " directions, attested and subscribed in the pre- " sence of the devisor by three or more witnesses; " and if no such devise thereof be made, the

[Doe v. Robinson, 8 B. & C. 296.]

" same shall be chargeable in the hands of the " heir, if it shall come to him by reason of a " special Occupancy, as Assets by Descent, as " in case of lands in Fee Simple; and in case " there be no special occupant thereof, it shall

[Bearpark v. Hutchinson, 7 Bing. 181.]

" go to the Executors or Administrators of the " party that had the estate thereof by virtue " of the Grant, and shall be *Assets in their " Hands."

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* (734.) Assets are the Fund out of which the debts of a deceased person are to be paid. Assets by descent are liable to those debts only (a) which are secured by Bond or Covenant expressly binding the party's heirs; but Assets in the hands of Executors or Administrators are liable to all debts.

6,) re-enacts the provision of the Statute of Frauds, (with some extension as to the nature of the tenement,) in the case of no devise being made thereof; with the additional provision, " that if the estate shall come to the executor " or administrator either by reason of a special occupancy " or by virtue of this Act, it shall be assets in his hands, " and shall go and be applied and be distributed in the " same manner as the personal estate of the testator or " intestate."

[See 1417, & n.]

[(a) That is, at law. As to the general liability of the lands of a deceased debtor or covenantor, at law, and in equity, see below, 887, & n., 1508, & n.]

(735.) But notwithstanding this provision, it seems that where a person who is seised of an estate for another's life, which is not descendible to his heir, dies intestate, the old rule of occupancy must take place until the appointment of an Administrator; as the immediate freehold would else be in abeyance during that time, which the Law will not allow even for a moment. 1 Prest. Conv. 44. (18.)

(736.) If the gift be to two persons for their lives, this is understood as extending to the life of the survivor. The parties are Joint-tenants, and if they continue so, the survivor will have the whole for his life; but if the Jointure be severed, the moiety of each will be held for his life only, and not for the other's life, if he chance to survive. 2 Bl. Comm. 187.

(737.) A Condition at common law may be annexed to an estate for life, as well as to a fee simple: but it seems that this cannot be a condition prohibiting all alienation on pain of forfeiture; though the estate may be made unalienable in its original limitation, if given not for life, but *until* alienation is attempted. (26.) 18 V. J. 433; 3 Swanst. 522; But see Bacon's Tracts, 243.

(738.) Wherever there is a gift by Will, it will necessarily be for the life of the Devisee, if it cannot be shewn to confer any other estate (*a*): but doubts may sometimes arise whether there

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[(*a*) But in a will made since the 1st of January, 1838, a devise without words of limitation, passes the fee simple, or whole estate of the Testator. Above, 284, n.]

be any gift at all; as if the devise be to *B.* after the death of *A.*, without any express devise to *A.* In this case, if *A.* be the Testator's wife, and *B.* his heir at law, it is settled that *A.* takes an estate for her life by implication; and if the devise be to *B.* the heir at law, after the deaths of the Testator's wife *A.* and another person, the Wife takes an estate for both lives. But in either case, if *B.* were not the heir, *A.* would take nothing.

4 Bac. Ab. 288, 289; 1 Fonbl. 449; 2 Fonbl. 55. 65.

Sect. 2.—*Of the Alienation, Forfeiture, and Merger of Estates for Life.*

(739.) Tenant for life may convey or demise his Tenement by the same means as Tenant in fee: but then he must take care to avoid the *Forfeiture which the law has made inseparably incident to all estates not of inheritance, upon an improper mode of alienation.

Litt. 609, 610, 611; 2 Sand. Us. 54.

(740.) By Grant, Lease for Years, Bargain

* (739. *n.*) This kind of Forfeiture differs from that which is incurred by the breach of a *Condition* principally in this respect; that the former, which arises from a general rule of law, does not affect derivative estates or incumbrances created before the wrongful act: but the latter, which arises from a special contract, defeats at once the principal estate to which it was originally annexed, and all interests which may have been derived out of it. Co. Litt. 234. a.

and Sale, or Lease and Release, he can pass no interest* beyond the compass of his own estate; and by these no forfeiture can be incurred. (741.) But a Feoffment, if purporting to exceed (72.) the bounds of the estate, divests the remainders and reversion, and creates a new and wrongful fee simple; in consequence of which the person who had the immediate remainder or reversion is entitled to enter presently, and thus to restore Litt. 415, 416. all the estates except that of the Feoffor, which is absolutely forfeited. (742.) And if the immediate remainder happen to expire before the 1 Co. 76. b. natural expiration of the preceding estate, and without such entry having been made, the next in remainder may enter in the same manner. (743.) Nor if the Feoffment be upon Condition, and the Feoffor re-enter for the condition Co.Litt. 202.b. broken before advantage is taken of the Forfeiture, will the right to that advantage be lost, though all the estates will have been already restored.

(744.) A Fine by Tenant for life of land in possession has the same effect as a Feoffment in fee simple, unless it contain proper words of restriction. Such words are usually inserted in Fines sur Concessit; but occur so seldom, (if ever in modern practice,) in those Sur Conu- Piggott v. Ld. Salisbury, 5 Bac. Ab. 856; Seymour v. Barker, 2 Tau. 198. [See 66, n.] (73.)

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† (740. n.) If, however, he attempt to create a greater estate, and the Reversioner or Remainderman by Deed *confirm* the estate so granted, it becomes as valid as if the confirming party had joined in the original Grant. Litt. 516.

See 1 Prest. Conv. 202.

sance, &c., that such Fines have been supposed necessarily to import an assurance of the Fee. (745.) A Fine of things lying in Grant has no greater effect, as to the interest which it passes, than a Grant: and yet a Fine by Tenant for life of such Tenements, unless it contain an express circumscription of the estate, causes a Forfeiture. So if any Tenant for life accept such an unqualified Fine from a Stranger, this cannot immediately affect the estates of the persons in remainder or reversion; but, by being party to a record which disaffirms their rights, the Conusee incurs a Forfeiture.

(40. 42. 98. 672.)

Co. Litt. 251. b. 252. a.

Co. Litt. 356. a. [See 66, n.]

(746.) A Common Recovery suffered by Tenant for Life, though it be made void by St. 14 El. c. 8, also induces a Forfeiture of his estate (*a*). Yet if *A.* be Tenant for Life, with remainder to *B.* in tail, and an ulterior remainder to *A.* in tai, it has been held that a Recovery suffered by *A.* is no forfeiture, because he has a right to make such an Assurance in respect of his own estate tail. But this decision contradicts one more ancient, which is said to have been made upon great deliberation, and of which no notice was taken in the argument of the recent case: so that the law on this point must perhaps be considered as not yet thoroughly settled; though in all probability the latter precedent would now be followed on a similar occasion.

Smith v. Clyfford, 1 T. R. 738.

Pelham's Case, 1 Co. 14. b. See 1 Prest. Conv. 111. 202.

[(*a*) And thereby destroys *contingent* remainders immediately expectant; for such are not protected by the Statute. See *Doe* v. *Gatacre*, 5 Bing. N. C. 608.]

(747.) If an estate for life, and a greater estate immediately expectant upon it, meet in the same person, the first estate is merged, unless there be some peculiar circumstances of prevention. And for this purpose though lives in general must be regarded as of equal duration, an estate for the party's own life is considered greater than an estate for another's life; and an estate for his own life is of course greater than one for the joint life of himself and another.

3 Prest. Conv. 225.

(341.)

Co. Litt. 42. a.

(724.)

(748.) But as there are various modes in which the two estates may be vested in the same person, this rule is subject to many distinctions, of which I shall here attempt to exhibit the outline.

In the first place, one of the Estates may be vested in him as Joint-tenant only with others; in which case he is, as to that estate, seised, to some purposes, of the whole Tenement, and to other purposes only of an undivided part or share in it. For the purpose of alienation he has only a part; and therefore if he be Joint-tenant of the first estate, and sole Tenant of the second, his share only will be merged: (749.) nor will even this partial merger take place, unless the two estates be vested in him by several conveyances; for it is perfectly regular, and not unusual, to convey the Tenement at once to two persons and the heirs of one of them; in which case the apparent intention, aided by the general inclination of the Law to favour a Joint-tenancy, makes them Joint-tenants for their

Co.Litt. 186.a.

(36. n.)

Co.Lit. 182. b.; Wiscot's Case. 2 Co. 60. b.; Litt. 285.

(165.)

lives notwithstanding the * remainder to one in fee. (750.) On the other hand, if the party be sole owner of the first estate and Joint-tenant of the second, his estate will be merged either for a whole or a part only of the Tenement, according to the apparent intention with which the two estates were brought together. Thus,
Co. Litt. 192 a. if *A.* and *B.*, being Joint-tenants in fee, make a lease for life to *C.*, and *C.* afterwards *surrender* the Tenement to *A.* this will cause the estate for life to be entirely merged. (751.) For a Surrender is a peculiar kind of Assurance, appropriated to those cases where the estate to be transferred is capable of being merged in the estate of the surrenderee, and is intended to be so: it is the mere expression of the Tenant's
(167.) abandonment of the estate with the Surren-
Co. Litt. 338. a. Touchst. 307. deree's consent; and though by the Statute of Frauds it must now be in writing, it never required the solemnity of a Deed, (unless the Tenement lay in grant,) nor of Livery of Seisin. (752.) On the other hand, if *C.* were to convey his estate to *A.* by the same means as he might to a Stranger, there, the intention being apparently not to destroy the estate, the merger would take place so far only as it must of necessity, that is, for one moiety; in consequence of which *A.* would be seised of that

(749, *n.*) This remainder, being peculiarly circumstanced, is not grantable separately from the Life Estate. Co. Litt. 182. b. 184. b., 2 Co. 61. a.

moiety of the Tenement in fee simple, and of the other moiety for the life of *C.*, with reversion in fee to *B.* (753.) So also if a person being sole seised in fee make a lease for life, and afterwards grant the reversion to the tenant for life and a stranger and their heirs, the like merger for a moiety ensues. Co. Litt. 182.b.

(754.) A man may also have one of the estates in right of his wife. Thus if a woman be tenant for life, with remainder to a man in tail, and they intermarry; now the husband holds the life estate in right of his wife: but if they levy a Fine of the land, it is no Discontinuance; which shows that the estates after marriage remain distinct, without merger, so that the husband still has the estate tail but as a remainder. (755.) And conversely, if the husband be tenant for life, with reversion to his wife in fee, there is no merger. Peck *v.* Channel, Cro. El. 827. (671. 672.) Perk, s. 622; 3 Prest. Conv. 305.

(756.) If indeed the wife be Tenant for life, and the reversion in fee be conveyed to the husband and wife, the estate for life is merged; (though if the wife survive her husband, she may revive it by expressing her dissent to the conveyance.) But the merger in this case is caused by the union of the two estates in the hands not of the husband, but of the wife, or rather of both * considered as one person. Purefoy *v.* Rogers, 2 Saund, 380. (212.)

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* (757.) When a conveyance is made to husband and wife, they take it in a closer partnership than ordinary Joint-tenants, for it is said that there are no moieties (36. *n.*)

Cook *v.* Fountain, 4 Bac. Ab. 203.

(758.) Where a person, having any estate capable of merger, takes a conveyance of the remainder or reversion merely as an instrument of transfer to others under the Statute of Uses; (as if *A.* being tenant for life, the reversion in fee is conveyed to him to the use of *B.*;) his
(135.) prior interest is preserved by the third section of that Statute.

Fearne, C. R. 340, &c.

(759.) If any contingent remainder be interposed between two estates, which in their creation are given to one person, the absolute coalition of them by merger in his hands is prevented: but if he convey both estates to another, then the merger takes place, and the contingent remainder is destroyed. (760.) So also if the two estates by any other act or event subsequent to their creation become for the first time vested in one person, their separate existence will cease: but if a person be made Tenant for life by Will, with a contingent remainder to another, and the reversion in fee descend from the testator to his devisee for life, here the Will and the Descent operating at once, and the one by the permission of the other, it is as if all were by one conveyance. (761.) In all cases,

Co. Litt. 28. a. & n.

between them: and if it be made to husband and wife, and a third person, the latter has a moiety for his share. Litt. 291.; Co. Litt. 187. b.; Cru. Rec. 239. 252. 60. And in strict legal language, where the wife has an estate, it is said that the husband and wife (and not the husband only) are seised in right of the wife. *Polyblank* v. *Hawkins*, Dougl. 314.

however, where a contingent remainder is the only obstacle to merger, there is such a coalition between the estates, that if the second be of inheritance, and the first be in possession, the right of Dower and most other incidents of a fee in possession will attach. (354.)

(762.) A vested remainder for years interposed between the Freehold and the Inheritance does not prevent their consolidation. (763.) And if *A.* be tenant for life, with remainder or reversion to *B.* in fee, and *B.* make a lease for years to *C.*, and then accept a surrender or conveyance from *A.* of his estate, the interest of *C.* will commence immediately in possession.

Bates's Case, 1 Salk. 254.

1 Salk. 338; Dove *v.* Williott, Cro. El. 160; Co. Litt. 338. b.

(764.) A Grant of the reversion to the Tenant for life, though it be only conditional, causes an irrecoverable Merger: but when a Surrender has been made upon Condition, an entry for Condition broken revives the estate. (765.) And if in any case the estate which is merged were, either previously to the transaction which caused the merger, or by that transaction, charged with a Rent or other incumbrance, this charge will still subsist as long as the first estate might have continued. Nor will even the accidental determination of the second estate before the time when the first estate, if it had not been merged, must have expired, cause the charge to cease. (766.) So much it may be thought is required by justice, and follows from the general rule that "the act "of the law works an injury to none." But in

Co.Litt. 218. b.

(751.)

Co. Litt. 185.a.

Bredon's Case, 1 Co. 76; 2 Saund. 386; Hob. 277.

See 3 Prest. Conv. 408, &c.

the event last supposed it seems also that the estate itself which is merged may, at least under some circumstances, have a virtual continuance.

Anon. 5 Bac. Ab. 852. Thus if *A.* be tenant for life, with remainder to *B.* in tail, remainder over to *C.*; and *A.* and *B.* join in a Fine to *D.*, and then *B.* die without issue in the lifetime of *A.*, it appears to have been considered that *D.* should still hold the land for the life of *A.* This however depends upon the circumstance of both estates passing at once from their several owners to the third party: (767.) and it seems to be a necessary pre-requisite that no forfeiture of the life estate should have been incurred by the transaction: a danger which perhaps would not be avoided, if the Conveyance were by Feoffment instead of Fine, since to the former no entirely lawful operation upon either of the estates could be attributed.

1 Sid. 83.

(39. 72. 671. 698,)

CHAP. IV.

OF SETTLEMENTS.

SECT. I.—*Of Settlements by Deed.*

Chap. 2, s. 2.

(768.) IT has been seen that at this day no certain or permanent Settlement can be made by a mere Entail: and it is equally clear that if there be two persons, as Father and Son, who are intended to take real property in succession,

the object may be secured by giving a life estate to the first, and an estate in remainder to the second. (769.) But it generally happens that one material object of a Settlement is to make a provision for persons unborn; and this, by the rules of the Common Law can only be effected by means of those Contingent Remainders, which are exposed to so many destructive accidents. There is, however, a contrivance by which those accidents may be and usually are prevented; in order to the explanation of which, it will be proper to resume the subject of the destruction of Contingent Remainders. Chap. 3, t. 2. (122, 32, 34.)

(770.) A Contingent Remainder, however good and valid in its creation, will always fail or be destroyed, if during the contingency an ulterior estate becomes an estate in possession; (32.) and this may happen by the determination of the Particular Estate in three different ways; *viz.* by its natural expiration, by merger, or by an act of forfeiture followed up by the entry of the party entitled. (741. 747.) (771.) And there is also one other mode, not yet noticed, in which the Contingent Remainder may be destroyed; namely, by the destruction of the particular Estate, although no advantage be taken of that destruction, by the person in whom the ulterior remainder or reversion is vested. [Doe *v.* Howell 10 B. & C. 191; & Doe *v.* Gatacre, 5 Bing. N. C. 609.] Thus, if *A.* be tenant for life of land in possession, with remainder to his eldest son (unborn) in tail, remainder to *B.* in fee, and *A.* make a feoffment in fee, or levy a Fine to *C.;* by this act

C. acquires the fee simple, which *B.* may defeat by entering for the forfeiture; but whether he enter or not, the estate of *A.* is alike irrecoverably destroyed, and the Contingent Remainder with it. (772.) But if in this case there were a previous estate for life, so that *A.* should be Tenant for life in remainder only, it seems that no act of *A.*, however destructive to his own estate, (as a conveyance to *B.*, which would merge it,) could destroy the Contingent Remainder while the previous estate subsisted: (773.) nor could the Tenant of that previous estate, while *A.*'s estate continued, effect that destruction; for the worst which the former could do by destroying his own estate, would be to change the estate of *A.* into a present right of entry, which is sufficient to support a Contingent Remainder, though a mere right of action is not. (774.) And it may here be observed that, although where a Contingent Remainder is once excluded by the ulterior estate coming into possession, no revival of the particular estate can restore it, yet a mere temporary failure of support from the preceding estates will not cause the remainder to fail, if there be a sufficient estate or subsisting right of entry to support it at the time when the contingency ceases.

Lane v. Vane, T. Jones, 98; 5 Bac. Ab. 857.

Fearne, C. R. 286.

2 Saund. 387.

Fearne, C. R. 349. 289.

(775.) It is obvious that the only way to ensure the preservation of a Contingent Remainder, is by giving a vested estate, sufficient to support it, to a person who may be trusted

for that purpose; and that this estate must be commensurate with the utmost duration of the contingency; though to make it more than commensurate would be a needless inconvenience. (776.) Upon this plan Settlements are commonly made. The property is conveyed to the use of *A.* for his life, (generally without (718.)
impeachment of waste,) and upon the determination of that estate by forfeiture or other means in his lifetime, to the use of* *B.* and *C.*, and (731, 733.)
their heirs, (or executors and administrators,) during the life of *A.*, in trust for him, and to preserve contingent remainders; and after his decease, to the use of his first son in tail, or otherwise, according to the intention. (778.) If indeed the estate thus given to the Trustees were only a contingent remainder, the object would not be accomplished, as *A.* might destroy that and the remainder to his unborn son to- Fearne, C. R 218.

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* (777.) There is no necessity on this occasion for more than one Trustee; but it is convenient to have two, that the trust may go with the estate to the survivor, and not, upon the death of one person, to his representatives, who may be strangers to the principal parties in the Settlement. And it is usual to provide for the appointment of a new Trustee upon the death of either, and for the transfer of the Estate held in trust, and of all powers connected with it, to the Trustees for the time being. If, however, the life estate in remainder should happen to be transmitted to the representatives of the survivor, they will of course be under the same obligations (which may be enforced by a Court of Equity) as the original Trustees.

gether; but it has been long ago decided that the remainder to *B.* and *C.*, during the life of *A.*, is vested. It is true that it depends upon a contingent event, whether this estate will ever come into possession; but so it would be, if the remainder were after the death of *A.*, or other determination of the estate, to *B.* for his own life, or even in tail; as *A.* might outlive the period of either estate. It is true also that the estate given to the Trustees is expressed to depend upon the determination of *A.*'s estate in a particular mode; but this is only because the other mode of determination, (*viz.* by the death of *A.*,) would coincide with the extreme limit of the estate in remainder, and therefore it would be nugatory to mention that as an event upon which the enjoyment of the latter estate should commence. It may be laid down with certainty, that the vesting of a remainder so long as it has any existence, never depends upon the quantity of estate; but that remainder which, if it were in fee simple, would be vested, is vested, though it be for ever so short a term. Now a remainder in fee simple is certainly vested, if, supposing the Particular Estate or Estates immediately to determine by any means whatever, the actual enjoyment of the property under it would instantly commence. And here the remainder given to the Trustees, if it were in fee simple, would be made to commence in actual enjoyment upon any determination of the estate of *A.*; the event of his

death being in fact omitted for no other reason than to avoid a contradiction which would be occasioned by the confined extent of the remainder.*

(780.) By means of this interposition of Trustees to preserve contingent remainders, that fixation of property called a Strict Settlement is effected. Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn: (781.) and a remainder may be secured even to a posthumous child of the only or last surviving Tenant for life; for by St. 10 W. 3, c. 16, a posthumous child is enabled to take as if born in his Father's life-time. (782.) But no remainder can be given to the child of a person who is not in existence. For if this were once allowed, no limit could be assigned to the extension of contingent remain- Fearne, C. R. 502.

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* (779.) The utility of such a remainder in trust, as above described, is not confined to Settlements, nor to cases where there are contingent remainders to be preserved. It is now a very general practice, upon a purchase, to convey the property to such uses as the Purchaser shall appoint, and in default of appointment, to his use for life, with remainder (as above) to the use of a Trustee and his heirs (or executors and administrators) for the life of the Purchaser, with a further remainder to the use of the Purchaser's heirs. The object of these limitations is to give the Purchaser all the powers and advantages of a person seised in fee simple, and at the same time to preclude his wife's inconvenient right of Dower. See Butl. Fearne, C. R. 347. n. (570.) (339, 354.) [But see now, 349, n., 351, n.]

ders through the remotest generations, and it would be easy to accompany these, for their preservation, with other remainders to persons ascertainable in due time as Trustees, so as to make the Settlement perpetual: and thus all the political inconveniences which attended Entails in their first creation would be renewed. (783.) In consequence of this rule of law it is usual to give the children successive estates in tail, by which, in default of alienation, the son may still succeed to the father by descent, though he cannot, to prevent alienation, be established in his place by purchase. (784.) But whether the contingent remainders be in tail or for life, or the first contingent remainder exhaust the whole fee simple, the period during which the property is fixed or tied up by the Settlement is necessarily the same; it is confined to a life
(198.) or lives in being, and the nonage of some per-
(781.) son who will be in existence, (in the womb at least,) at the expiration of such life or lives.
Fearne, C. R. 430, &c. Hence has been derived the rule which requires
(163.) that springing and shifting uses, unless they be immediately preceded by an estate tail, (in
(695.) which case there can be no obstacle to alienation,) should vest in possession before the end of some period consisting of a life or lives, in being at the making of the Settlement, and twenty-one years and a few months, (allowed
Beard v. Westcott, 1 Turn. 25. for gestation,) afterwards. (785.) It seems also to be the opinion best supported by recent authority, though not yet satisfactorily decided,

and by no means of easy decision, that these additional years and months must coincide with the nonage either of the person whose estate is to be divested, or of the person in whom the estate under the Shifting Use is to vest(*a*); except that where the payment of money, or any other act which requires time, is made a condition precedent to its vesting, a reasonable period, as one year, independent of infancy, may be allowed. (786.) But where the period for which the enjoyment of the estate is deferred is not extended to any person's life, it is difficult to prescribe to it any other limit than that of twenty-one years absolutely taken.

Loyd v. Carew, Pre. Cha. 72.

(787.) The rule last mentioned necessarily requires that Powers of Revocation and Appointment should only be exerciseable within the same period from the execution of the Set- (174.)

[(*a*) It has lately been decided by the unanimous opinion of the Judges, in a case in D. P., that a limitation to take effect after one or more life or lives in being and twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person, is not too remote or otherwise void; but that if the limitation is to take effect after a life or lives in being and twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person, born, or *en ventre sa mere*, it is void as too remote. They considered twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists. *Cadell* v. *Palmer*, 10 Bing. 140; S. C. 7 Bligh, 202.]

tlement by which they were created, within which any Shifting Uses finally defined by that Settlement would be required to vest in possession. But it is necessary to carry this restriction a step further. If the use to be appointed have
Sug. Pow. 432. received its form or condition in any degree from the original Settlement, if the estate be there limited, or the person to receive it in any way pointed out, then, (notwithstanding the interposition of an Appointment, under a particular restricted Power, to complete what was so begun,) the period of vesting must be reckoned from the Settlement itself. But if the Power be so general and absolute as to be equivalent, for the purposes of alienation, to the ownership in fee simple, then an Appointment under it, so far as concerns the commencement of that period, stands on the same footing with an original Conveyance.

(788.) (*a*) It seems also, upon principle, to be

[(*a*) But it has been lately decided, that the usual power of sale or exchange in a Settlement is not void in consequence of its exercise not being in terms limited by the Settlement to the period allowed by law for the vesting of a shifting use. See *Boyce* v. *Hanning*, 2 Cr. & J. 334; *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Capron*, Ib. 138. n.; *Waring* v. *Coventry*, Ib. 140. n.; S. C. 1 M. & K. 249. These decisions however go no further than to support an exercise of such an unlimited power made during the lives of parties living at the time of its creation; and the case of *Cadell* v. *Palmer*, (above, 785, n.) will, it seems, enable us to extend the principle of these decisions to the case of an exercise of the power within twenty-one years after the

necessary, in the creation of a Power, to assign the period within which it must be exercised. If indeed it be given simply to one person now living, or to any number of such persons and the survivor and survivors of them, the period is necessarily confined to a life in being; but if the same power be extended, (as it may be,) to the representatives, (whether heirs, executors and administrators, or assigns,) of any person to whom it is first given, its duration is thus left indefinite. Still if it be made exerciseable only with the consent of persons now living, or of the Guardians of Infants who shall immediately succeed them in estate, no further restriction can be required. But, supposing a Settlement to *A.* for life, with remainder to *B.* in fee, and a power to *C.* and his heirs to revoke the uses; it can hardly be contended that this Power is valid; for, if there were no question of its validity, no sufficient ground would here be afforded for an implied or constructive restriction; and the rule has been given in such cases, that if the Power be bad in the extent in which it is given, it cannot for that reason, be remodelled and made good. It is difficult however to determine how far the frequent neglect of this rule in practice may impose a duty on 11 V. J. 283.

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death of the survivor of such parties. Whether the power may be exercised beyond this period seems to be doubtful; Sir E. Sugden seems to favour the opinion that it may. See 2 Sugd. Pow. 496, 7.]

Courts of Justice of endeavouring, if possible, to evade it.

Sugd. Pow. 146; 1 Sand. Us. 194, 195. (See 788, n.) (789.) On the other hand, if the estate of *B.* were in tail, it seems clear that the Power might be made co-extensive with that estate; because a Recovery suffered by the Tenant in Tail, when in possession, would at any time effectually defeat it. Indeed it is very usual to give a Power to the Trustees and their representatives, with the consent of the Tenant for life, or Tenant in Tail in possession for the time being, to revoke the uses of the Settlement for the purpose of an Exchange, or of an absolute Sale of the Property with a view to invest the money in the purchase of other lands; and, for the reason above given, no objection can be made to this Power as of too indefinite duration. (790.) While the estate of the Tenant for life continues, the Power, it is true, is secured: the Tenant in Tail in Remainder cannot suffer a Recovery without the concurrence of the Tenant for life; and even this concurrence will not necessarily destroy the Power.* For his old estate for life

Roper v. Hallifax, Sugd. Pow. 641; 1 Sand. Us. 178; 8 Tau. 845; (106. 689.)

(180. n,) * (791.) It can only affect it by destroying the Power of consent given to the parties; and this consequence the Tenant for life, so far as it concerns himseif, may avoid, as well as the destruction of his life estate, with all the certainty of technical accuracy, by conveying to the Tenant to the Præcipe such an estate only as will leave a reversion
(176.) in himself, to which that Power will continue attached, and which either by force of a Condition, or by a proper declaration of uses accompanied with merger, may be reduced into possession after the Recovery. Sugd. Pow. 55; 1 Sand. Us. App. 429, &c.

may still continue; and whilst that lasts, any Shifting Use arising by an exercise of the Power given to the Trustees must be antecedent to the Estate Tail, and paramount to it in Title; and therefore that Power will still continue exerciseable, notwithstanding any act of the Tenant in Tail. But when the Estate Tail comes into possession, the Power of Revocation and the privilege of suffering a Recovery are equal and concurrent, so that whichever is first exercised must defeat the other.

(792.) Although a Power, the direct object of which is to create a Perpetuity, (*i. e.* to restrain alienation beyond the period allowed,) is absolutely void; yet a Particular Power will not be invalidated by the circumstance of its being in general terms, which apparently authorize the creation of such estates, among others, as would be void for their remoteness; for it is left to the Donee of the Power to restrain this generality of expression, by an appointment conforming to the rules of Law. (793.) However, if he fail in this respect, the Appointment, so far as it exceeds the limits, will be void; and so will every part of it which is made uncertain by that excess, or is involved in the same remote contingency; but a definite interest given independently of what is erroneous may still be supported.

Sug. Pow. 144.

Routledge v. Dorril, 2 V. J. 357.

(787.)

Sug. Pow. 541. &c. [Carver v. Bowles, 2 Russ. & M. 307.]

(794.) And where, without violating any rule of Law, the Appointment is in part unauthorized by the Power, it seems that a tem-

Crombe v. Barlow, 4 V. J. 681.]

porary suspense or contingency connected with the unauthorized gift will not invalidate that which is authorized. (795.) But if an estate tail be given to a person not within the Power, it is held that an ulterior remainder to an object of the Power is void. This however is not to be referred simply to the failure of a previous estate; for at Common Law, if there was a good Particular Estate created in the first instance, the interposition of a void Remainder, (as a life estate to a Monk,) did not vitiate or defer the ulterior Remainders; and upon a Conveyance to Uses, or a Devise by Will, if the person to whom the Use or devised estate is first limited refuse or disclaim, this only accelerates the remainder. (796.) But where the preceding estate is originally void from a defect of power in the Donor, it seems to be interposed merely for the sake of delaying the enjoyment of that which follows; this delay therefore is an essential condition of the gift, and being extended to a period exceeding the allowed limits of a Springing Use, (namely, the continuance of a person's posterity, where there is not a commensurate Estate Tail,) must render the gift void.

Brudenell v. Elwes, 1 East, 442.

5 Bac. Ab. 826.

(208.)

(213.)

1 Co. 154. a.b.; Cro. El. 423. See 8 V. J. 568, 569.

(784.)

(797.) It is a general rule that nothing shall be considered a Springing Uue which by any just construction can be established as a Contingent Remainder. This was perhaps the true ground of Decision in a Case where a Fine was levied by Husband and Wife, of the Wife's

2 Saund. 388.

Davies v. Speed 2 Salk. 675.

lands, to the use of the heirs of the body of the husband by the Wife, and, for default of such issue, to the use of his right heirs; the Wife died before the husband; and it was held that these uses were void. Now if the Use had been allowed to result to the Wife in fee, and upon the Husband's death to shift, and vest in the issue of the marriage (if any) in tail, with remainder to the heirs general of the husband; or, if there were no such issue at his death, to vest then at once in his heir; no objection could be made to the limitations. But there was no necessity that the use should result to the wife in fee; it could not result to the husband at all, because the estate was not his; it could not result to the wife for the life of her husband, because that which results is the old use, and must therefore be transmissible as before, and not subject to devolve upon occupants or executors instead of heirs: but it might well result to the wife for the joint lives of herself and her husband; and then the ulterior estate was a contingent remainder, valid in its creation, but which failed in the event for want of a continuing freehold to support it.

See 1 Sand. Us. 140.

2 Salk. 679. (730. 733.)

(724.)

(340.)

(34.)

Sect. 2.—*Of Settlements by Will.*

(798.) The indulgence of the Law to Testators has unfortunately in many instances been just so great, as to induce men to make Settle- (283.)

ments by their last Wills without legal advice, and then to disappoint their intentions. For though the meaning of the Testator is to be ascertained, for the most part, by the ordinary rules of grammar and criticism; yet when words are employed which have two acceptations, one popular, the other technical, a Court of Law will necessarily incline to take them in the technical sense, not only because it is *legal*, but because it is more definite and certain than the other. And there are also some rules relating to the subject matter, which perhaps almost in proportion to their utility in producing a general uniformity of decision, (the surest foundation for certainty of right,) have tended to defeat the objects of particular dispositions.

See 4 B. & C. 622.
[799. n.]

(799.) The first and most universally applicable of these maxims is (*a*), "that when the Testator's particular intention is inconsistent with "his general intention, the latter is to be preferred;" where by the general intention is meant his design that such and such persons shall take, or at least be capable of taking,

Fearne, C. R. 191, &c. 1 Butl. ib. 204. n.; Butl Co. Litt. 271. b. n. 1. VII. 2.

[(*a*) This rule has been much objected to as vague and incorrect. In a late case, Denman, C. J. said that the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. 5 B. & Ad. 640; and see 3 A. & E. 963, 964.]

some estate under his Will; by the particular intention, his design that they shall take such and such estates, and with the utmost certainty of enjoyment. (800.) The second maxim is, (*a*) "that a title by descent is to be preferred to a "title by purchase;" which, as we have seen, (335. 339.) is most frequently exhibited in the form of the "Rule in Shelley's Case." (801.) A third maxim (197.) requires every Contingent Estate to be construed, if possible, as a Remainder rather than an Executory Devise. (802.) And a fourth Fearne, C. R. 378. inclines the balance of legal interpretation to a Vested rather than a Contingent Estate.

(803.) The first maxim generally prepares the way for the application of the second; and it will be found that the rule in Shelley's Case has a more extensive field of operation in Wills than in Deeds; because, in the former, several words besides "heirs" are capable of being considered as words of limitation rather than of purchase.

(804.) And first, where in a Will an estate Fearne, C. R. 191. 197. of freehold is given to any person, followed by a limitation in words expressive of a remainder, to the "heirs of his body," this, if the word "heirs" be understood in its proper legal sense, must give an estate tail to the ancestor: for

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[(*a*) This rule, as applicable to the heir of the testator, and as between him and the devisee, has, as we have seen, been departed from by the legislature in the recent alterations of the law of descents and of wills. See above, 284, n. 338, n.]

the argument is irresistible, that if no estate (654.) of freehold had been given to him, the heirs of his body would have taken in a course of succession as nearly resembling that of a descent from him as possible; why then, where an estate of freehold is given, shall they not take actually by descent? whether the first heir take by descent or purchase, he is the same person, his estate is descendible in the same way, and he takes it at the same moment (for if it were a contingent remainder to him, *as heir,* it could not vest till the death of his ancestor, as no one has an heir in his lifetime;) and therefore no case can be more favourable for the application of the rule. (805.) And accordingly it seems that no additional circumstance in the Will, which does not alter the sense of the word " heirs," as the expression of an intention that the first taker shall have no power of alienation, or shall have the estate for his life *and not otherwise*, or the interposition of an estate given to Trustees during his life to (776.) preserve the (supposed) contingent remainders, nor perhaps all these circumstances together can make any difference in the operation of the Devise to confer an estate tail, (either immediate, or in remainder after the estate of the Trustees,) on the intended Tenant for life.

Perrin v. Blake Fearne, C. R. 156. 158.

(806.) But if the word "heir" be used in the singular number, with words of limitation superadded, the case is different; as where lands were devised to " *A.* for life, and after to the

Archer's Case, 1 C. 66. [Willis v. Hiscox, 4 M.& C. 197.]

"next heir male of *A.* and to the heirs male "of the body of such next heir male." Here though the words "heir male" might (in a Will) be words of limitation, and perhaps might be so notwithstanding the word "next;" and though there is nothing to alter their legal signification; yet, to answer the intention of restricting the inheritance to "the heirs male of "the body of the next heir male," they must be taken as words of purchase. (807.) And so, where the devise was "to *A.* for life, with remainder to the heir male of his body for life, "and for want of such heir male" to another.

Fearne, C. R. 179.

White v. Collins, 1 Com. Rep. 289.

(808.) And sometimes the context requires that the word "heirs," in the plural, should be taken to mean "sons," or "children." Thus, even in a Deed, (of Covenant to stand seised to Uses,) the limitations being to *E.* for life, with remainder to the first son of his body, and the heirs male of the body of such first son; with successive remainders (in the same words) to the second, third, and fourth sons; after which followed, "*and so* severally and respectively to "every of the heirs male of the body of the said "*E.* and the heirs males of the bodies of such "heirs males according to their ages and se"niorities; and for default of such issue," remainder to *W.*: it was held that *E.* did not take an estate tail.

Lisle v. Gray, Fearne, C. R. 151.

(809.) And it seems that the like effect may be produced in a Will by words of division and limitation superadded. For where Gavelkind

Doe v. Laming, 2 Burr, 1100;

and see Crump v. Norwood, 7 Tau. 362. [But see Jesson v. Wright, 2 Bligh, 57; Jack v. Fetherston, 9 Bligh, 237; Doe v. Featherstone, 1 B & Ad. 944; Dunk v. Fenner, 2 Russ. & M. 557.]

lands were devised to *A.* "and the heirs of her "body lawfully begotten or to be begotten, as "well females as males, and to their heirs and "assigns for ever, to be divided equally share "and share alike, as Tenants in Common and "not as Joint Tenants; it was held that the children of *A.* took by purchase. One argument, (perhaps superfluous,) used in favour of this decision was, that the land being Gavelkind, the word "heirs" in the plural was no more inevitably a word of limitation than "heir" in the singular number in other cases, but was equally capable of being satisfied in the first generation. (810.) Upon a devise of Gavelkind Lands in terms exactly similar to the above, except that on the one hand an express estate for life was given to *A.* followed by one to trustees to preserve contingent remainders, and on the other there were no superadded words of *limitation*, the words of *division* were not held sufficient to convert "heirs" into a word of purchase.

Doe v. Harvey, 4 B. & C. 610.

(667.) (811.) The word "issue," though relating to persons unborn, may be a word of purchase, if accompanied with words of limitation. Thus where there was a devise "to *A.* for life without impeachment for waste: and in case he "have any issue male, then to such issue male "and his heirs for ever; and if he" (meaning *A.*) "die without issue male, then to *B.* and "his heirs for ever;" it was held that *A.* took

Loddington v. Kime, 1 Salk. 224.

an estate for life only, with a contingent remainder in fee to his issue*.

(814.) So on a devise "to *A.* and the issue "of her body lawfully to be begotten, as tenants "in common (if more than one); but in default "of such issue, or, being such, if they should "all die under the age of twenty-one years, and "without leaving lawful issue of any of their "bodies, then to *B.*" Here the latter words confined the "issue" first mentioned to the first generation, and had the effect of words of limitation in fee simple. Doe *v.* Burnsall, 6 T. R. 30. (664. 295. 811.)

(815.) And so where the devise was to *A.* for life, "and after him to his eldest or any Seaward *v.* Willock. 5 East, 198.

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* (812.) And yet a Recovery suffered by *A.* (who had no issue) destroyed *B.*'s remainder; for that was a contingent remainder in the alternative, to take effect if *A.* never had issue, and not a vested remainder expectant equally on the failure or determination of the estate given to the issue, since the latter was not a Particular Estate, but a fee simple. (666.)

(813.) But in a similar case, where the words were only a little less expressive of an alternative, the construction was different. The devise was "to *A.* (the Testator's "Nephew) for his life, without impeachment of waste, and "after his decease to the eldest son of *A.* lawfully to be "begotten, and to the heirs of such eldest son, upon con- "dition that such eldest son be christened and called by "the name of *F.*: and in default of issue male of *A.*," to *B.* (another Nephew) and his eldest son, in the same words; "and for want of such issue to the Testator's own right "heirs." It was held that *A.* took an estate for life, with remainder in tail to his eldest son, with a further implied remainder in tail to *A.* *Doe* v. *Halley*, 8 T. R. 5. [See Parr *v.* Swindells, 4 Russ. 283; Doe *v.* Gallini, 5 B. & Ad. 621; S. C. 3 A. & E. 340; Tate *v.* Clarke, 1 Beav. 100.]

"other son after him during his natural life, "and after them to as many of his descendants "issue male as shall be heirs of his or their
(782.) "bodies down to the tenth generation during "their natural lives;" without any ulterior disposition: it was held that each person described, who could take any thing, must take an estate for life.

(810.) Doe *v.* Applin, 4 T. R. 82. [809, *marg.*]

(816.) But words of *division* alone will not, it seems, make "issue" a word of purchase. Thus by a Devise to *A.* for life, "and after his decease, *to and amongst* his issue, and in default of issue" to others; *A.* took an estate tail. And so also where the limitation to the issue was "as tenants in common."

Doe *v.* Cooper, 1 East, 229.

(667.) Doe *v* Vaughan, 5 B. & A. 464,

(817.) The word "children" is so far a more appropriate word of purchase than the word "issue," that accompanying words of division are sufficient to prevent its being construed as a word of limitation. Thus, on a devise to *A.* for his life, and after his decease to all and every his child and children, whether sons or daughters, to take as tenants in common, if more than one, in equal shares, and for want of such issue, to the Testator's own heirs; it was held that both *A.* and his children took estates for their lives only.

(661.) Robinson *v.* Robinson, 1 Burr. 38. [Broadhurst *v.* Morris, 2 B. & Ad. 1; Doe *v.* Davis, 4 B. & Ad. 43.]

(818.) But where the devise was to *A.* for his life and no longer, provided that he alter his name and take that of *R.*; and after his decease to such son as he shall have, lawfully to be begotten, taking the name of *R.*; and for

default of such issue, to *W. R.* and his heirs; it was decided that "*A.* must by necessary implication, to effectuate the manifest general intent of the Testator, be construed to take an estate (799.) in tail male, he and the heirs of his body taking the name of *R.*; notwithstanding the express estate devised to *A.* for his life and no longer." (819.) And generally the word "son" (though Mellish v. Mellish, 2 B. & C. in the singular,) wherever it can be taken to 520. mean sons, or issue, who are to take in succession, and not as companions, is of itself a word of limitation. (817.) [Doe v. Garrod, 2 B. & Ad. 87.]

(820.) It is sometimes doubtful to what antecedent the words "in default of *such* issue" (660.) are to be referred. Upon this point it appears to have been decided, that where the devise is to *A.* for life, with remainder to his children and their heirs, "and in default of such issue" to *B.*; if the children are made to take successively (as by the description of first and other sons, &c.) the words "such issue" refer to their heirs, meaning heirs of their bodies, and therefore each child takes an estate tail; (821.) but if the children are made to take distributively, in equal shares, &c., then, although *B.* should be a relation, the word "heirs" will continue to express a fee simple, and the words "such "issue" refer to the children themselves, so that *B.* will take only a contingent remainder, in the alternative of there being no children*. Lewis v. Waters 6 East, 336. Doe v. Perryn, 3 T. R. 484; R. v. Marq. Stafford, 7 East, 521. (663.) (812.)

* (822.) Perhaps if the words "in default of issue of *A.*," or "if *A.* shall die without issue," instead of "in default of

Butl. Co. Litt. 271. b. n. 1. VII. 2.

(784, &c.)

(824.) The period within which an Executory Devise must take effect is the same with that prescribed to a Springing or Shifting Use; but it is to be computed from the death of the Testator, not from the date of his Will.

Sugd. Pow. 326. 469.

(825.) Where there is a power to appoint Uses by Will, the Testamentary Appointment

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"*such* issue," were used to introduce the ulterior remain-"der, it would be held that the children took estates tail with cross remainders. For in *Smith* v. *Hurlock*, (7 Tau. 129,) where the words were, "if *A*. shall depart this life "without leaving any lawfully begotten child or children, "or issue of any such child or children," (which is only another expression for *A*. dying without issue,) the decision implies clearly that the children took estates tail: and in
(813.) *Doe* v. *Halley*, (8 T. R. 5,) before cited, the like estate was held to be given to *A*.'s eldest son, with a remainder in tail by implication to *A*. himself, to fill up the chasm which would else be occasioned by his having other issue male.

(823.) But it is of course indifferent whether the generality of the words "without issue" be restricted by the word "such," or by other equivalent expressions. As, "if *A*. shall die without issue, *or leaving issue, and such "child or children shall die before attaining the age of twenty-"one years, or without lawful issue*." Here "issue in the first part of the sentence evidently signifies the *children*, who are afterwards mentioned: and in the case (*Doe* v. *Selby*, 2 B. & C. 926) where this introduction to the ulterior limitation to *B*. occurred, it was held that there were in the first instance contingent remainders in the alternative to the children and to *B*.: and if children should be born, their estates would then be subject to executory devises in favour of *B*., to take effect on their respectively dying under twenty-one without issue. For the last "*or*" in the sen-
(510, 612.) tence, was taken to mean "*and*."

receives the same indulgent construction as if it were a direct Devise under the Statute of Wills (*a*).

(826.) Sometimes, where there is a power to appoint by will to Children, (which cannot include Grandchildren,) and the limitation of estates is left to the discretion of the Testator, he appoints to the children and their issue in the form of a Settlement. If this appointment were made by Deed, all beyond the life estates given to the children would be void: but in a Will, by the application of the first Maxim above mentioned, the children themselves, it appears, become entitled to Estates Tail. (827.) And so if a strict Settlement be made by Will on a person unborn, and who does not come into existence before the Testator's death, it seems that his estate for life will be converted into an Estate Tail. This is generally known as the *Cy Prés* Doctrine in the interpretation of Wills relating to Real Property.

(571.)

Pitt *v.* Jackson, 2 Bro.C.C. 51; 2 V. J. 364.

(799.)

(782.)

Nicholl *v.* Nicholl, 2 Bl. Rep. 1159.

See Sug. Pow. 534, &c.; Butl. Fearne, C. R. 204. n.

(828.) If a Tenement be given by Deed to *A.* for life, or in tail, with remainder to *B.*, and a condition be annexed to the estate of *A.*, which is evidently not intended to affect that of *B.*, this condition is void. For the Grantor or

Fearne, C. R. 270. 272.

[(*a*) With regard to the formalities of execution of an appointment by will, it may be mentioned here, that the recent Act, 1 Vict. c. 26, requires that such appointment be executed *as a will*, notwithstanding the power shall have required any additional or other form or solemnity; (s. 10;) and also that the other provisions of the Act extend to such an appointment. (s. 1.)]

his heir, entering for the condition broken,
(23. 27.) must defeat the whole conveyance, and one estate as well as the other; and therefore he shall not enter at all. (829.) But in the interpretation of a Will this consequence is avoided,
(737.) by considering the condition as if it were the original limitation of the estate of *A.* Thus, if a devise be to *A.* for life, on condition that he do not marry *C.*, with remainder to *B.*, this will be construed as if it were to *A.*, until he shall marry *C.*, and then, or upon death, to *B.*

(830.) And wherever there is a Remainder,
Fearne, C. R. 508. or Executory Devise, depending on the breach of a condition by the owner of the preceding estate, if that estate never becomes vested, the same effect follows as if the condition had been broken. Thus, upon a devise to *A.* and his
Avelyn v. Ward, 1 Ves. 420. heirs, on condition that he should execute a release of certain claims, and, on his refusal, to *B.* and his heirs; *A.* dying before the Testator, the devise to *B.* took effect.

(831.) A contingent estate, which cannot
George v. Gore, 2 P. Wms. 27. take effect as a Remainder for want of a Freehold to support it, may be good as an Executory Devise. Thus, upon a devise to *A.* and *B.* for five hundred years, "and after the determi-"nation of that term, to the first son of *F. G.*, "to be begotten in tail male," it was ultimately decided that the estate vested in the son on his birth, independently of, though without prejudice to, the estate for years. (832.) But here, if a previous estate for life had been given to
(797.) any other person, who happened to survive the

Testator, and to die before the birth of the son, the estate tail of the latter having once been established as a Contingent Remainder, could not then have been converted into an Executory Devise, but must have failed absolutely.

CHAP. V.

OF CHATTEL INTERESTS.

SECT. 1.—*Of the different kinds of Chattel Interests.*

(833.) ALL the subjects of Real Property, which are generally alienable, may be made subjects of Personal Property also by creating a Chattel Interest in them. These interests may be said to bear a similar relation to the Freehold and Inheritance to that which the Surface bears to a Solid: they differ not only in quantity, but in order or kind; and accordingly whenever in the limitation of a Settlement or otherwise a Chattel Interest is followed by an Estate of Freehold, the latter is more properly said to be *subject to* than *expectant upon* the (831.)
former. It is true that Chattels and Freeholds may have, either of them to the other, the relations of Particular Estates and Remainders; but where the Freehold is preceded by a Chattel only, the Freehold is a *present* interest, not, if it be a Remainder, in power of alienation only, (39. 30.)

nor, if it be a Reversion, merely in power of
(33. 42. 302. 390.) alienation and right of Seignory, but (as we have partly seen) in most of the circumstances and
See 2 Bl. Comm. 142. incidents of Title. Of so little account was the property of the inferior classes of society at the time when the principal rules of the Common Law were fixed. But in the progress of that Law, Chattel Interests became of more importance*; and being attended with the exclusive right of possession and usufructuary enjoyment, they are now, in proportion to their duration, (which may be indefinitely extended,) little inferior in *value, if free from charges and with-

* (834.) There is, however, some difference of privileges. The transmission of all personal property upon the owner's death is affected by the Duties on Probates and Legacies; of which hereafter. The right of (a) voting at County
Sect. 3. Elections is confined to Freeholders, as was formerly the burthen of serving on Juries; but the latter has been imposed on others by several Statutes, and now by St. 6 G. 4, c. 50, (repealing former Acts,) all persons having a clear yearly income of 20*l.* from lands or tenements held by lease for an absolute term of not less than twenty-one years, or for any term determinable upon a life, are quali-

[(*a*) By the Parliamentary Reform Act, St. 2 W. 4, c. 45, this right is extended to Copyholders, or owners of land of any other tenure*, for life or any greater estate, of the yearly value of 10*l.*; (s. 19;) and also to Leaseholders, where the original term is for not less than 60 years, and the land of the yearly value of 10*l.*, or where the original term is for not less than 20 years, and the land of the yearly value of 50*l.*, or where the Leaseholder occupies as tenant at a rent of not less than 50*l.* (s. 20.)]

[* But the right of Freeholders for life is qualified by s. 18.]

out impeachment of waste, to estates in fee simple. And therefore if we compare the Inheritance to a Solid, it may well be to the Earth itself, of which in general no part is more esteemed than the surface.

(835.) The mode of creating a *Term of years* in Lands and Tenements, (for by the word Term is understood the interest, and not merely the period for which it is held,) has been already in part explained. (836.) The Term, whether created by Demise under the Common Law, or by declaration of Use, or by Devise in a Will, may be made to commence either immediately, or on a future day or event; in which latter case, unless there be a particular estate to support it as a remainder, it must necessarily be a mere *Interesse Termini* until the time arrives for its reduction into possession. (837.) It does not appear that any period was anciently fixed by the Common Law within which this must take place; but as a Bargain and Sale or other

Co. Litt. 45. b.

(58, &c. 131.)

Co. Litt. 46. a.

(61.)

1 Sand. Us. 118.

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fied to be Jurors. The right of (*a*) killing Game is allowed by St. 22 & 23 Car. 2, c. 25, to persons holding lands or tenements of the clear yearly value of 150*l*. by leases for ninety-nine years or more. The qualifications of Freeholders for these two purposes are fixed at 10*l*. and 100*l*.

[(*a*) By St. 1 & 2 W. 4, c. 32, (repealing St. 22 & 23 Car. 2, c. 25, and the numerous other Acts on the subject,) the qualifications by estate and degree required by the former Game Acts now no longer exist; that by certificate alone is retained.]

limitation of a Springing Use for a Term of years, or an executory devise for such a Term, would, it is conceived, be void if its operation were deferred beyond the prescribed limits, it is probable that a Lease at Common Law would now, by analogy, be subjected to the same rule.

Co. Litt. 45. b. (838.) The words "Grant," "Demise," and "to Farm Let," are the most proper operative verbs in a Lease for years, and they are commonly all used together; but any words which

4 Bac. Ab. 160. show "the intent of the parties that the one "shall divest himself of the possession, and the "other come into it for a determinate time," are in general sufficient for the purpose; so that it often proves difficult to frame such an Agreement for a future Lease, as shall not in itself

Morgan v. Bis- have the *operation of a Lease. (845.) It seems

* (839.) There is an inconvenience in this respect attending the difference between the Stamp Duties chargeable on Leases and Agreements. The Duty on a mere Agreement, (not being by Deed,) when not exceeding one thousand and eighty words, is 1*l*.; when exceeding

(455.) that length, the same as on an ordinary Deed. And an Agreement for granting a lease at a Rack Rent, (*i. e.* a Rent which is the sole pecuniary consideration for the Grant,) not exceeding 5*l*. per annum, is exempted from

[Blount v. Pearman, 1 Bing N. C. 408.] Duty. (840.) But Leases in general bear either an *Ad Valorem* Stamp, or the common Deed Stamp. If there be a Fine or Premium, and no rent amounting to 20*l*. per annum, the *Ad Valorem* Duty is estimated by the Fine, as

(452.) upon a Sale; but from this Duty are exempted all Leases for a Term determinable upon a life or lives not exceed-

however to be settled that if it appear, from the express words of the Agreement, or by inference from the indefiniteness of some of its stipulations, to have been the intention of the parties that the lessee should not take possession of the land until the execution of a more formal instrument, no legal estate is created until that is effected. (846.) The word "Grant" or "Demise" implies an absolute Covenant on the part of the Lessor for the Lessee's quiet

sell, 3 Tau. 65; Doe v. Groves, 15 East, 244. [Pinero v. Judson, 6 Bing. 206; Staniforth v. Fox, 7 Bing. 590; Doe v. Ries, 8 Bing. 178; Warman v. Faithful, 5 B. & Ad. 1042; Rawson v. Eicke, 7 A. & E. 451; Chapman v. Bluck, 4 Bing. N. C. 187.]
2 Bac. Ab. 65.

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ing three, and the Leases of Ecclesiastical Corporations (aggregate or sole) for any term not exceeding twenty-one years. (841.) The *Ad Valorem* Duty on a Lease at Rack Rent, where the Rent is under 20*l.*, is 1*l.* (130.)

		£.	s.	d.
Amounting to £ 20, but under	100	1	10	0
100	200	2	0	0
200	400	3	0	0
400	600	4	0	0
600	800	5	0	0
800	1,000	6	0	0
1,000 or upwards		10	0	0

(842.) And where there is a Fine as well as a Rent, both these *Ad Valorem* Duties are payable except in the above exempted cases. (843.) The Counterpart, or Duplicate, of a Lease which is subject to a Duty not exceeding 1*l.*, is itself charged with a like sum: but if the Duty on the original be above 1*l.*, that on the Counterpart is 1*l.* 10*s.*, with an addition of 1*l.*, for every entire quantity of one thousand and eighty words after the first. (844.) Leases of Waste Land to poor or labouring persons, for any Term not exceeding three lives or ninety-nine years, where the Fine shall not exceed 5*s.*, nor the rent 21*s.* per annum, are entirely exempted. (840.)

enjoyment during the Term; which however
(593.) may be qualified by a more limited express Covenant.

(847.) The words of limitation of a Term of years are those which denote the fixed period
Co. Litt. 45. b. of its duration; which they may do either expressly, or by reference to some means of ascertainment; as, "for twenty-one years," or* "for so many years as *A.* shall name;" but "for so many years as *A.* shall live," would not serve the purpose, as not having an arithmetical import, but expressing merely the uncertain period of his life; (848.) and yet, "for "ninety-nine years, if *A.* shall so long live," is a good and very frequent limitation of a chattel interest, of which the duration must in all human probability coincide with the life of the person named. And similar to this is the
(727.) limitation, "during the minority of *A.*" (849.) It is usual also, but not necessary to add the "executors and administrators" of the grantee, as analogous to "heirs" in the case of a fee simple. And this analogy holds so far, that

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* (847. *n.*) A lease for "14 *or* 7 years" is valid, and the ambiguity is to be removed by the option of the lessee. *Doe* v. *Dixon*, 9 East, 15. A Lease "for one year, and "so on from year to year," or "not only for one year, "but from year to year," creates a tenancy for at least two years, (*Denn* v. *Cartwright*, 4 East, 31,) which is reasonable, since if the limitation were simply "from year to "year," there would be a certain term of at least one year, as we shall see presently.

where any estate is given to a person, and an estate for years to his executors by the same instrument, the latter is held to vest also in himself. Co. Litt. 54. b.; 3 Bac. Ab. 266; 5 Bac. Ab. 733; Kirkpatrick v. Capel, Sugd. Pow. 60. n.

(850.) The doctrine of (a)Estoppels is applicable to Leases for years: so that if a person execute an *Indenture* purporting to demise, for any Term, Lands in which he has in fact no estate whatever, or no estate by a good legal title, and the want of estate do not appear upon the instrument, the Lease will operate upon any interest which he may afterwards acquire in the same Lands during the continuance of the Term. But if any valid interest, however short of that pretended, actually pass from the Lessor, there can be no estoppel against him. An Indenture is required, that the Deed may be the act of both parties; for it is ne- (83.) 1 Ventr. 358; Co. Litt. 352. b. (180. *n.*) [Doe *v.* Goldsmith, 2 C. & J. 676.] Co. Litt. 45. a. Co. Litt. 363. a.

[(*a*) The doctrine of Estoppels has of late years been frequently before the consideration of the Courts, and it may perhaps be now considered as established, that the doctrine is applicable to any Indenture, as well as to an Indenture of Feoffment or of Demise. But for this purpose, the several requisites mentioned above, as necessary in the case of the Demise operating by Estoppel, must be observed;— *i. e.* the grantor must have no estate at the time on which the instrument can operate by way of conveyance, and the want of estate must not appear upon the instrument; and the instrument must, it seems, be an *Indenture*. See, in addition to the cases cited above, 83, n., 3 A. & E. 13, 14; *Doe* d. *Strode* v. *Seaton,* 2 C. M. & R. 728, 730, 731. See too, above, 531, n., and *Doe* v. *Errington,* 6 Bing, N. C. 79.]

(140. *n.*) cessary that Estoppels of this kind should be reciprocal.

Co.Litt. 214.b. (851.) A Condition, distinct from the original limitation, may be annexed to a Term of years in its creation, for its future determination, in two ways; either, as in a Grant
(23.)
of the inheritance or freehold, to operate only if enforced by the entry of the Grantor or his representatives; or to make the estate cease at once, on performance or breach of the condition itself, without any additional ceremony.

Co. Litt.204.a. (852.) Conditions annexed to a Chattel are more favoured by the Law than those which tend to defeat a Freehold Estate. In particular,
(737.)
alienation may be prohibited on pain of forfeiture. But then the original limitation must not be to the lessee *and his assigns;* for this would be a contradiction.
Mo. 881; Hob. 170; Cro. Jac. 460.
(853.) And the indulgence to such Conditions is so slight, that where a Lease for years was made, with Condition that neither the Lessee nor his assigns should alien, and the Lessor afterwards gave his licence to the Lessee to assign his estate, it was held that this dispensation entirely removed the restriction, and exempted the estate from the imposed forfeiture, on any future alienation by the Assignee.
Dumpor's Case 4 Co. 119. See Doe *v.* Smith, 5 Tau. 795.
The neglect however of the Lessor to avail himself of the forfeiture by entry, and his subsequent acceptance of rent, have not this effect, but amount simply to a confirmation of the first alienation.
Doe *v.* Bliss, 4 Tau. 735.
(854.) Compulsory alienations, as upon Bankruptcy, are
Doe *v.* Bevan, 3 M. & S. 353.

not within the terms of a mere general prohibition, though they may be expressly included (*a*).

(855.) By the Common Law, Covenants between the Lessor and the Lessee, relating to the Land, would in general run with it on* both sides: (856.) but the benefit of a Condition was entirely lost by alienation of the Reversion. This inconvenience was remedied by St. 32 H. 8, c. 34, which attaches both the benefit and the obligation of Conditions as well as Covenants to the Reversion in the hands of a Grantee or Assignee. (857.) But still the benefit of a Condition or Covenant which is already broken, and requires to be enforced by entry or action, cannot be assigned: nor can that of a Forfeiture actually committed by the illegal alienation of the Lessee.

(581, *n.*)

Fenn v. Smart, 12 East, 444.

(741, 742.)

(858.) Long Terms, as of five hundred or one thousand years, are frequently granted by way of Mortgage, with a Proviso for the determination of the estate on payment of the money (851.)

* (855. *n.*) It must however be observed, that the obligation of the Lessee's Covenants, though it will pass to an Assignee of the whole Term, is not communicated to an Underlessee. *E. of Derby* v. *Taylor*, 1 East, 502.

[(*a*) And so too, in the case of life interests in real or personal estate, limited so as to restrain alienation. See *Green* v. *Spicer*, 1 Russ. & M. 395; *Lear* v. *Leggett*, Ib. 690; and see *Yarnold* v. *Moorhouse*, Ib. 364.] [737.]

(23, 24. 18.) by a certain day. These are preferable to Mortgages of the fee simple in one respect, as on the death of the lender, the pledge, as well as the interest in the debt, devolves on his personal representatives. Similar Terms also generally occur in the series of limitations in Marriage and other Settlements, being vested in Trustees for the purpose of enabling them by Mortgage or otherwise to raise portions for children, or to secure the payment of annuities, debts or other sums of money. And hence, although Courts of Equity* interfere to enlarge the period allowed for redemption, it will sometimes happen that such long Terms of years become absolute property. (860.) And, (which is of much more frequent occurrence,) when a redemption takes place after the time fixed by the original contract has elapsed, the Term (having, through want of an exact performance of the Condition, become an absolute and indefeasible legal estate,) may, instead of being surrendered to the owner of the inheritance, be assigned to a Trus-

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* (859.) The property in general continues redeemable, even at Law, as long as the Mortgagor is suffered to retain the possession, notwithstanding the expiration of the stipulated time. For by St. 7 G. 2, c. 20, s. 1, if an Ejectment be brought by the Mortgagee against the Mortgagor, (provided no Suit be pending in any Court of Equity for Redemption or Foreclosure,) the payment of principal, interest and costs shall be deemed a satisfaction of the Mortgage, and the Court may compel the Mortgagee to re-convey the estate.

[Doe v. Clifton, 4 A. & E. 814.]

tee for him and his heirs, and thus be kept on foot as an appendage to that inheritance out of which it was derived.* (861.) If now we add the estates sometimes given by Settlements for ninety-nine (or any other number of) years, (848.)
if the party shall so long live, (instead of an estate of freehold for his life,) and the many beneficial Farming and Building Leases which are always in existence, we shall find the title now under our consideration to be of no small importance.

(862.) Farming and Building Leases are often made by virtue of a Power of Appointment for See Sug. Pow. 566, &c.
that purpose contained in a Settlement. In making such Leases the conditions imposed by (173.)
the Power must be strictly observed. One of these generally is that the Term shall commence immediately, as an estate in possession, upon the execution of the Lease; which brings the Power, if given to a Tenant for life or other proprietor, within the description of Powers (177.)
Appendant to the donee's estate.

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* (860. *n.*) It is evident that the advantages attending this practice must consist in the power of eluding the claims of strangers on the inheritance, by setting up the Term as prior to them in creation, and therefore preferable in right. The sort of double dealing thus introduced would be extremely mishievous, were it not so controlled by Courts of Equity as to be in general less subservient to fraud than conducive to the safety of honest Purchasers; to whom it affords a protection not very unlike that of the (235. 627, &c.)
Registry Acts.

Litt. 67. (863.) Any Estate of which the duration,
(835, 847.) however short, is measured by number, is legally denominated a Term of *Years*. Of this nature is a tenancy for a fixed number of weeks or months, and also that which is called "from
(847, *n.*) "year to year." (864.) This last, (unless there
Richardson v. Langridge, 4 Tau. 128. be an express Agreement between the parties to another effect,) is always implied, where a Tenement is occupied under a rent payable yearly, half yearly, or quarterly; that circumstance, being considered so inconsistent with a preca-
Clayton v. Blakey, 8 T. R. 3. rious tenure as even to control the literal import of the enactment in the Statute of Frauds,
(166.) that a lease for more than three years, not put in writing, shall have the effect of an Estate at
Right v. Darby, 1 T. R. 159. Will only. (865.) The Estate from year to year consists in the first instance of a certain Term of one year, which, upon the expiration of the first half year, unless notice be given by one of the parties to the other of his contrary intention, becomes an equally assured Term of two years, reckoning from the commencement of the tenancy; and thus a new year is continually added to the Term, as often as the *

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* (865. *n.*) Half a year is one hundred and eighty-two days. Co. Litt. 135. b. But if the tenancy commence from one of the quarterly feast days, (25th March, 24th June, 29th September, and 25th December,) it seems that the half year may be computed from feast day to feast day without regard to the number of days. *Doe* v. *Kightley*, 7 T. R. 63; *Doe* v. *Watkins*, 7 East, 551.

half year's previous notice which would secure its expiration is omitted to be given.

(866.) It has already been observed that some uncertain periods, relating to the raising of money out of lands or tenements, are allowed, for the sake of convenience, to constitute Chattel Interests. Thus, where a Testator devises lands to his *Executors* " for payment of his debts, " and until his debts be paid;" this gives them a chattel which will go to the executors of the surviving Executor, if the debts be not fully paid in his lifetime, instead of ceasing upon his death as a freehold estate so limited would. (867.) And where the owner of land grants a Rent out of it to another, with a clause enabling him, when the Rent shall be in arrear, to enter upon the land and take the profits until the arrears be satisfied; the entry of the party pursuant to that clause gives him a chattel interest of a like indeterminate duration.

(728.)

Co. Litt. 42. a.

Jemott *v.* Cowley, 1 Saund, 112; 1 Lev. 170.

(868.) Estates by Statute Merchant, Statute Staple, and Elegit, are so far of the same kind with those last mentioned, as their duration is measured by the satisfaction of a debt; but as the tenancy does not commence until an Extent (*i. e.* a valuation) of the Tenements has been made by the proper authority, these Estates seem to have all the certainty of continuance which is necessary to constitute a Term of Years. And accordingly, although the Statutes to which they owe their origin, speak of the *seisin* of the Creditor, and provide that if dispossessed he

Coote Mortg. 65. But see Plowd. 524.b.

Co. Litt. 43. b. shall have his remedy by *Assize*, yet it has been always held that such interests have the similitude only and not the nature of Freehold.

(869.) The Statute Merchant, (for so the instrument itself is called, the form of which is prescribed by St. 11 Edw. I, amended by 13 Edw. 1, St. 3,) the Statute Staple, (according to 27 Edw. 3, St. 2, c. 9,) and the Recognisance in the nature of a Statute Staple, (under St. 23 H. 8, c. 6,) all agree in this, that they are recorded acknowledgments of a debt; which not being paid by a certain day, the Sheriff is authorized to deliver the lands* as well as goods of the debtor to the creditor "by "a reasonable *extent*, to hold them until such "time as the debt is wholly levied." (870.) And 2 Bac. Ab. 698. the liability extends to all the lands which the debtor had at the time of acknowledging the Statute or Recognisance, though he should afterwards sell or otherwise dispose of them, and to all which he may afterwards acquire.

(871.) These Statutes and Recognisances are now wholly disused; but whatever relates to the effect of a Statute Staple is still of practical importance, as being applicable to many cases where the King is creditor. For by St. 33

* (869 *n.*) The word "tenements" also occurs in the St. of Edw. 3, but not in the earlier Acts; notwithstanding which omission, it has been decided that a Rent may be extended or taken in execution under a Statute Merchant. More, 32, pl. 104.

H. 8, c. 39, s. 50, all (*a*) Bonds relating to the Revenue are to be made to the King himself in a prescribed form, and being so made, are to have the effect of Statutes Staple. (872.) And by St. 13 Eliz. c. 4, (already referred to,) all (253, 626.) Lands, Tenements, Profits, Commodities and Hereditaments which any of the (*a*) Treasurers, Receivers, Tellers, Customers, Collectors, Farmers, Officers, and Accountants, there enumerated, shall have within the time whilst he shall remain accountable, shall be liable to, and shall be put and had in execution for, the payment of his arrearages, in like manner as if he had the day he became first Officer or Accountant, stood bound by Writing obligatory, having the effect of a Statute Staple, for the payment of the same. But by s. 10, those persons are excepted, whose yearly receipt, or whose whole receipt, shall not exceed 300*l*.

(873.) (*b*) The writ of Elegit, (which is still in

[(*a*) See St. 2 Vict. c. 11, (above, 253, n.) The Act also requires that in order to affect the lands of any Officer, as against purchasers or mortgagees, the name of the office, and the time of acceptance of office, must be entered in the Index. (s. 8.)]

[(*b*) The remedies of Creditors against the property of their Debtors have been greatly extended by the recent Act, 1 & 2 Vict. c. 110.

The Sheriff or other officer is empowered, on the writ of elegit, to deliver all such * lands, as the debtor or any per-

[* The words are, " lands, tenements, rectories, tithes, rents, " and hereditaments, (including lands and hereditaments of " copyhold or customary tenure.)"]

use,) was given by St. Westm. 2, or 13 Edw. 1, St. 1, c. 18, to be issued, "when a debt is re-

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son in trust for him shall be seised or possessed of at the time of entering up the judgment or at any time afterwards, or over which the debtor shall, at any such time, have any disposing power exerciseable, without the assent of any other person, for his own benefit; in like manner as he might before the Act have done as to a moiety of the lands of the debtor. (s. 11.)

The Judgment, moreover, shall operate as a charge on all † lands, of or to which the debtor shall at the time of entering up the judgment or at any time afterwards be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which he shall, at any such time, have any such disposing power as aforesaid; and shall be binding as against the debtor and all claiming under him *after the Judgment,* and the issue of his body, and all whom he might bar without the assent of any other person; and the judgment creditor shall have the same remedies in Equity against the hereditaments so charged by the Act, as he would be entitled to in case the debtor had power to charge the same, and had by writing under his hand agreed to charge the same with the judgment debt and interest‡; but he shall not proceed in Equity to obtain the benefit of such charge, until after one year from the time of entering up the Judgment. (s. 13.)

And further, all decrees and orders of the Courts of Equity, rules of Courts of Common Law, and orders in matters of Bankruptcy or Lunacy, whereby any money or costs are payable to any person, shall have the effect of judgments; and such person shall be deemed a judgment

[† The words are, "lands, tenements, rectories, advowsons, "tithes, rents, and hereditaments, (including lands and heredita- "ments of copyhold or customary tenure.")]

[‡ By s. 17, the judgment debt is made to carry interest, at £4 per cent. per annum.]

" covered or acknowledged in the King's Court, " or damages awarded," at the option of the Creditor, instead of the ordinary process of execution. The Act directs the Sheriff to deliver to him all the chattels of the Debtor, (saving only his oxen and beasts of his plough,) and the one half of his * land, until the debt be levied, upon a reasonable price or extent. (875.) In consequence of this enactment, a Judgment for debt or damages in any of the Courts of Law at Westminster, whether given in an adverse action, or entered up on the Rolls by the party's consent without any previous process (unless of mere formality,) has the like effect in binding his present and future real property as a Statute Merchant; except that only one half of the land, &c. (to be set out by [See now 873, n.]

* (874.) This includes Rent, and, as it seems, every kind of Real Property which is capable of valuation and division, (2 Bac. Abr. 712, 713,) except the Ecclesiastical Benefice (including the Glebe) of a Parson or Vicar. These however, may be subjected to execution upon a Judgment by means of a Writ of Sequestration directed to the Bishop. Coote Mortg. 91. [869, n.] [See 873, n. (*a*) *, †.]

creditor within the act, and all the remedies given by the Act to judgment creditors are also given to such person.§ (s. 18.)]

[§ The Courts of Law, Equity, and Bankruptcy, are empowered to frame new writs for giving effect to these provisions. (s. 19.) See the new forms of writs of elegit and fieri facias, for Courts of Law, 5 Bing, N. C. 366; and for Courts of Equity, 1 Beav. xv.]

the Sheriff according to the valuation * made by a Jury summoned by him for the purpose,) can ultimately become the subject of the Estate by Elegit. (876.) And if there be such an Estate subsisting, only one half of the remaining moiety of the lands can in general be taken under a second Writ of Elegit: though the question between the two creditors, which shall be entitled to the entire moiety, will depend on the priority of their respective Judgments. But if the Judgments are both of the same Term, this is incapable of decision; for then, by a fiction of law, the date of both is referred to the first day of that Term; and thus the whole land may be taken upon two Elegits.

Morris v. Jones 2 B. & C. 232.

Atty.-Gen. v. Andrew, Hard. 23.

[Doe v. Creed, 5 Bing. 327.]

(877.) In consequence of the fiction just mentioned, a purchaser might be injured by a Judgment given against the Vendor even after the execution of his conveyance. And therefore, by s. 14 and 15 of the Statute of Frauds, (29 Car. 2, c. 3,) Judgments are made to operate, as against purchasers *bonâ fide* for valuable consideration, only from the day when they

Sugd. Vend. 650, &c.

* (875. *n.*) This valuation is always below the truth; which has given occasion for the interference of the Courts of Equity. Coote Mortg. 65. But the (*a*) Court out of which the Elegit issued will now, upon Motion, bring the Creditor to an account. *Price* v. *Varney*, 3 B. & C. 733.

[1 & 2 Vict. c. 110.]

[(*a*) The late act directs that the lands are to be held by the creditor, subject to such account in the Court out of which the execution was sued, as a tenant by elegit is subject to in a Court of Equity. (s. 11.)]

are signed by the Judge or other Officer.* (878.) And they are also by St. 4 and 5 W. and M. c. 20, (perpetuated by 7 and 8 W. 3, c. 36, s. 3,) made void as against such Purchasers, unless (*b*) *docketed* (or indexed) within [See Reg. Gen. 3 H. T. 4 W. 4, 5 B. & Ad. ii.]

* (877. *n.*) This provision relating to Judgments in the King's Court at Westminster, is extended to those in the Courts of Great Session in Wales, and in the Courts of Session in the (*a*) Counties Palatine, by St. 8 G. 1, c. 25, s. 6.

[(*a*) The provisions of St. 1 & 2 Vict. c. 110, above noticed, applicable to the superior Courts of Law, are extended to the Courts of C. P. of Lancaster and Durham; but judgments of those Courts shall not affect lands as to purchasers, mortgagees, or creditors, unless registered with an officer of the Court as the Act directs. (s. 21.)

And by s. 22, judgments, rules, and orders, obtained in certain inferior Courts of Record, may be removed into the superior Courts: but they shall not affect lands as to purchasers, mortgagees, or creditors, any further than if not so removed, until a writ of execution be put into the hands of the Sheriff.]

[(*b*) By St. 2 Vict. c. 11, s. 1, no judgments are to be thereafter, (4 June, 1839,) docketed under 4 & 5 W. & M. c. 20; and no judgment already docketed shall, after the 1st of August, 1841, affect any lands, as to purchasers, mortgagees, or creditors, unless and until registered as is after mentioned. (s. 2.)

But it is provided, that no judgment, decree, order, or rule, shall, by virtue of St. 1 & 2 Vict. c. 110, affect any lands as to purchasers, mortgagees, or creditors, unless and until a memorandum of such particulars thereof as are specified in the Act, shall be left with the senior Master of the Court of C. P. at Westminster, who shall forthwith enter such particulars, and also the day and year when the memorandum was left with him, in a book, in alphabetical [1 & 2 Vict. c. 110, s. 19.] [2 Vict. c. 11. s. 3.]

a certain time; which it is now the practice to do immediately upon their being signed. (879.)

Sugd. Vend. 467.

There are similar provisions in the several Register Acts: that for Middlesex in particular

(235, 627.) effectually secures the purchaser by making the Judgment bind the lands from the time of regisration only. (880.) And all (*b*) Chattel Interests in Land are held to be protected by

Sugd. Vend. 658.

s. 16 of the Statute of Frauds, which enacts that no Writ of Execution shall bind the property of *Goods*, but from the time that such Writ shall be delivered to the Sheriff, Undersheriff or Coroners to be executed; which time

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order, by the name of the person whose estate is intended to be thereby affected; (which book all persons may search on payment of one shilling:) nor, after five years from the date of the entry thereof, unless a like memorandum thereof is again left with the senior Master within five years before the execution of the instrument vesting or transferring the right or interest in or to such purchaser or mortgagee, or within five years before the right of such creditors accrued; and so *toties quoties* at the expiration of every succeeding five years; and the senior Master shall forthwith re-enter the same as before*.

[2 Vict c. 11, s. 4.]

[873, n.] [(*b*) But now, chattel interests, equally with freeholds, will be bound, as against purchasers, from the date of the

(877.) judgment.]

[* As against purchasers, mortgagees, or creditors, who became such before the 1st of October, 1838, no elegit or judgment shall affect the lands otherwise than as before the Act. (ss. 11, 13.)

[1 & 2 Vict. c. 110.]

[2 Vict. c. 11, s. 5.]

And no judgment, decree, order, or rule, though registered. shall affect lands as against a purchaser or mortgagee, without notice thereof, further than a docketed judgment would have done before the Act.

See further on the subject of notice, and of protection against judgments, 1551, 1555, ch. 8. sect. 3.]

is to be indorsed by them upon the Writ. Before the Statute, Goods and Chattels were bound, not by the Judgment, but by the award of the Writ of Execution, and from the time of its date or Teste. (881.) Under a Commission of Bankruptcy, by St. 6 G. 4, c. 16, s. 108, (as formerly by St. 21 Jac. 1. c. 19, s. 9,) Creditors by Statute, Recognisance or Judgment, not having obtained execution and an actual seizure of the Bankrupt's property, have no advantage over the other Creditors (*a*). 8 Cro. 171. a.; Cro. El. 440. (241.) See Taylor *v.* Taylor, 5 B. & C. 392. [See s. 108; & St. 1 W. 4, c. 7, s. 7.]

(882.) The tenth section of the Stat. of Frauds empowers Sheriff, &c. to make and deliver Execution upon any Judgment, Statute or Recognisance, of all such Lands, Tenements, &c. as any other person or persons shall be seised or possessed of (*b*) in trust * for the party against whom Execution shall be sued, like as if that party had been seised of such Lands, Tene-

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* (882. *n.*) That the trust must be entirely for the benefit of that party, see *Harris* v. *Booker*, 4 Bing. 96 (*c*).

[(*a*) And it is provided that the charge in equity given by s. 13 of the late act, (above, 873, n.) shall not give the judgment creditor any preference in case of the bankruptcy of the debtor, unless the judgment be entered up one year before the bankruptcy.] [1 & 2 Vict. c. 110.]

[(*b*) Trust estates are now put on the same footing as legal estates, as regards judgments. See ss. 11, 13.] [1 & 2 Vict. c. 110.]

[(*c*) See *Lodge* v. *Lyseley*, 4 Sim. 70; *Foster* v. *Blackstone*, 1 M. & K. 297. It would seem that the trust must still be entirely for the benefit of the debtor, to make it liable to be extended on an elegit under s. 11; but the charge in

See Sug. Vend. 460. ments, &c. *of such estate as they be seised of in trust for him at the time of the said Execution*
(734.) *sued.* (883.) It also makes a trust in fee
Scott v Scholey 8 East, 467. simple, Assets by Descent as if it were a legal
See 1 Sand. Us. 272. estate. (884.) But the trust of a term of years is not within the Statute (*a*).

(885.) It may here be observed that a Judgment, though in general a better security for the payment of money than a Bond or Covenant, as it constitutes a charge or *lien** upon the lands of the debtor, which those instruments
[See now, 873, n.] do not, may yet be found inferior to them in one instance. (886.) For if the debtor die seised
(733) of lands in fee simple, or *pur autre vie*, which descend to the heir, he † is personally liable, in

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* (885. *n.*) This, however, until the execution of the Elegit, does not amount to such a present *right in or to the land,* as may be released by that name. Co. Litt. 265. b. *Barrow* v. *Gray*, Cro. El. 55. But the right of execution may be released by apt words. 2 Bac. Abr. 706.

† (887.) And where the Debt is ascertained, so as to be recoverable in an action of (*b*) Debt, (*Wilson* v. *Knubley*,

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Equity, under s. 13, extends to all estates and interests, legal and equitable. Quære the effect of the Act on the doctrine
[2 Sugd. V. & P. 399.] of the two cases cited in this note. Sir E. Sugden seems to think that, as regards the purchaser, it is not affected.]

[See 873, n.] [(*a*) The trust of a term of years may be extended under s. 11, of the late act, or charged in Equity under s. 13; and it would seem that it was also within the 10th section of the Statute of Frauds. See *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 450.]

[(*b*) St. 3 & 4 W. & M. c. 14, is repealed by St. 1 W. 4, c. 47, which however re-enacts its provisions, and extends

respect of these assets by descent, to answer any debts which his ancestor has by Deed bound himself and his heirs to satisfy; and thus the whole debt may possibly be recovered, when a *moiety* of the lands, taken by Elegit under a Judgment, might not prove sufficient for the purpose. It is to be observed, however, that the Creditor by Judgment has the first claim upon the personal estate of the deceased. 3 Bac. Ab. 80.

There is no Statute limiting the time within which an Action may be brought upon a Bond or other Specialty, or Execution sued out upon a Judgment for Debt (*a*). But Bonds which

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7 East, 128,) the same liability, by St. 3 W. & M. c. 14, (called the Statute of Fraudulent Devises,) is extended to devisees, unless the devise be upon trust for the payment of debts.

(888.) A Judgment given against the Ancestor does not bind the heir personally. 3 Co. 12. b. And when Judgment has been given for a debt, it supersedes or extinguishes the previous obligation. *Higgens's Case*, 6 Co. 44. b.; *Stafford* v. *Clark*, 2 Bing. 377; but see *Twopenny* v. *Young*, 3 B. & C. 208.

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them so as to render the devisee liable to an action of covenant, as well as of debt. *Quære* whether, under this Act, an action of covenant may be brought for breaches subsequent to the covenantor's death.] [Farley *v.* Briant, 3 A. & E. 839, 846.]

[(*a*) By St. 3 & 4 W. c. 42, s. 3, an action on a bond or other specialty, must be brought within 10 years after the end of that Session, or 20 years after the cause of action. And by s. 40 of St. 3 & 4 W. 4, c. 27, no action or suit

have lain dormant for twenty years, where no satisfactory explanation of the neglect can be given, are presumed to be satisfied. And Execution on a Judgment will not in general be allowed, after one year, without the previous formality of a writ of *Scire Facias* directed to the Sheriff, in consequence of which the party liable to the Judgment receives notice of the intended Execution, and is enabled to show cause why it should not be issued. This writ, it seems, cannot be obtained, after ten years, without a motion in Court made for the purpose. It appears, however, that the Debtor may, by his agreement, renounce the protection afforded by the *Scire Facias*. But after twenty years, the presumption of satisfaction would probably be no less peremptory upon a Judgment than upon a Bond, and would enable the Court upon motion, (if there were no *Scire Facias*,) to set aside the execution.

2 Phill. Ev. 138.

2 Bac. Ab. 729.

2 B. & C. 242.

See Hu[illegible]e v. Pickering, 2 B. & C. 555.

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shall be brought to recover any money secured by mortgage or judgment, or otherwise charged on land, or any* legacy, but within 20 years after a present right to receive the same shall have accrued to a person capable of giving a discharge for the same: or else within twenty years after the last payment of any part of the principal or interest, or the last acknowledgment of the right in writing, signed by the party liable or his agent, and given to the party entitled or his agent.]

[* This section, it has been held, extends to mere pecuniary legacies not charged on lands; though the Act would appear, from its title and general tenor, to relate exclusively to real property. *Sheppard* v. *Duke*, V. C. 19th Feb. 1839. MS.]

SECT. 2.—*Of the Alienation and Extinction of Chattel Interests by Deed or other Contract.*

(889.) EVERY total Alienation, (other than testamentary,) of a Chattel Interest, which is not essentially destructive of it, is called an Assignment. To effect this, a Deed in general is not necessary; but the third section of the Statute of Frauds requires writing and signa- (167.) ture. (890.) It may be effected by any words which denote the intention, though indeed it Parmenter v. Webber, 8 Tau. 593. has been formerly held that the words "bargain "and sell" were not sufficient to transfer the (43.) 1 Bac. Ab. 478-9. legal estate. (891.) If the word "Grant" be used, it implies a Covenant for quiet enjoyment. (846.) Butl. Co. Litt. 384; a. n. 1; 2 Bac. Ab. 65. (892.) But a mere Grant of the Land, without words of limitation, is said to make the Grantee 1 Salk. 346. And see E. of Derby v. Taylor 1 East, 502. only Tenant at Will; though a Grant of the *Term,* or the *Estate,* would be an effectual asssignment.

(893.) It has been thought that the operation 5 Co. 11 b.; Hob. 171; 2 Prest. Abst. 5; Plowd. 524 a.; Touchst. 251; Doe v. Polgrean 1 H. Bl. 535. of an Assignment must, like that of a Feoffment or Grant, be immediate; but according to some authorities it may be suspended.

(894.) But if the Alienation be for a term of years which must end before the expiration of the original Chattel Interest, this is not an Assignment, but a Demise or Underlease, which leaves a Reversion in the Grantor; and, like any other lease for years, it may be made to take (836.) effect in possession or estate at a future day.

Co. Litt. 46. b. (895.) A Husband has an absolute power to assign the Chattels Real of his wife to whom he will; but if he neglect to exercise this power, they go to the survivor.

(739, &c. 747, &c.) (896.) The Rules concerning the Merger and Forfeiture of Chattel Interests are in general the same with those relating to Estates for life, but with some variations. With respect to Merger, the following points may be observed.

(833.) Co. Litt. 54. b. (897.) A Term of Years, of whatever duration, is always considered as of less magnitude (because anciently of less importance) than an estate of Freehold; and therefore if the same person have such a Term and a Freehold estate immediately succeeding it, and both in the same right, the Term is merged. (898.) But 3 Prest. Conv. 110. the interposition of a second estate for years vested in another person, is sufficient to prevent the merger of the first.

Hughes *v.* Robotham, Cro. El. 302. (899.) A Term of years will merge in the immediate reversion, though that be a chattel interest also, and even of shorter duration than 4 Bac. Ab. 211, 212. the former; but whether, if the second Chattel be a *Remainder*, the merger will take place, is somewhat doubtful.

(900.) If the sole owner of a Term become (750, &c.) Joint-tenant of the immediately expectant Freehold, what has been said of an Estate for life Sir R. Bovye's Case, 1 Ventr. 133. See Cro. El. 532. *contr.* & Butl. Co. Litt. 182. b. n.* *sed. qu.* in a similar case seems applicable; and the more so, as by the merger of the Term for a moiety the Joint-tenancy will not be destroyed; Co. Litt. 185. a. for the Freehold Reversion expectant upon a

mere Chattel Interest may stand in Jointure with a Freehold in possession.

(901.) A wife's Chattel Interest, though absolutely alienable by the Husband, will not, as a necessary consequence of the marriage, be merged in his Freehold; and whether, if the Freehold come to him by purchase after the marriage, this, without any further act by him, will cause a merger, may at least be doubted. (902.) Nor will the Husband's Term merge in the wife's Freehold, unless one or the other be acquired by purchase after the marriage, or the husband become entitled, by the birth of a child, to a future Tenancy by the Curtesy. (903.) The Chattels vested in an Executor are also exempted from Merger by any accidental concurrence with the Freehold in his person: and, as far as the rights of the Testator's creditors are concerned, from Merger by the Executor's own purchase. Sugd. Vend. 381. (895.) Platt v. Sleap, Cro. Jac. 275; Sugd. Vend. 380. (348.)

(904.) Besides those Assurances which produce a Merger properly so called, of which kind is a Surrender; there is a transaction by which an * Estate for years may be extinguished, called a Surrender *in law*. This consists in the acceptance from the Reversioner, of (751.) 4 Bac. Ab. 212.

* (904, *n.*) An estate for life, it is said, may also be extinguished by a Surrender in Law, arising from the Grant of a new Lease even for years; (Touchst. 301;) but for this purpose, it is conceived, the new Lease must be made to commence immediately.

a new lease for any term whatever, to commence at any time before the expiration of the old one: in which case it cannot properly be said that the previous term is merged in the Reversion, unless the commencement of the new lease be immediate; but the implied Surrender must be referred to the supposed inconsistency of retaining the former estate, and accepting another which is in part concurrent with it. (905.) But where the new Lease is

Roe v. Abp. of York, 6 East, 86.

made by a Tenant for life of the reversion, and intended to take effect by virtue of a Power of Appointment extending beyond his life, it shall not, if this Power be ill executed, take effect out of the lessor's own interest, but shall be absolutely void, in order that the old lease may continue. (906.) On the other hand, an agree-

Hamerton v. Stead, 3 B. & C. 478. (838. 845.)

ment for a new Lease, not amounting to an actual demise, may yet, if followed by a corresponding change in the mode of occupation, constitute such a Tenancy at Will as must imply a relinquishment of the pre-existing interest (*a*).

(61. 131, 836.) Plowd. 198; Doe v. Walker, 5 B. & C. 111.

(907.) A mere Interesse Termini can neither promote nor hinder the merger of any estate; nor can itself, properly speaking, be surrendered; (908.) but it may be extinguished by

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[865.] [(*a*) It may here be observed, that a Tenancy from year to year can not be put an end to by a mere parol licence to quit. *Mollett* v. *Brayne*, 2 Campb. 103; but otherwise, if such licence be followed up by an acceptance by the landlord of possession of the demised premises. *Grimman* v. *Legge*, 8 B. & C. 324.]

Surrender in Law, or by Assignment or Release. Co.Litt. 338. a.
And it is said that the benefit of a Recognisance, (868, &c.)
&c. may be assigned to any person (though he
be not the debtor) who becomes owner of the Cro. El. 552.
Land, in order to its extinction.

(909.) As the only remedy for a person dis- (370. 403.)
possessed of a Chattel Interest is by Entry or [370, n.]
Ejectment, it is clear that (with the proper exceptions in respect of disability) if he neglect to enforce it for twenty years after his right of possession has accrued, the right is in effect
lost. (910.) But the right of possession is Fairclaim v.
sometimes suspended in consequence of intes- Little, 5 B. & A. 214.
tacy, and the nonexistence of an Administrator at the time when it would otherwise accrue (*a*).

(911.) A Chattel Interest, in respect of which Saffyn's Case,
the right of possession has already accrued, will 5 Co. 123. Cro. Jac. 60.
also be barred by a Fine levied by the Free- [See 66, n.]
holder in adverse possession, and five years non-
claim; and so it seems where the Fine is levied (187. 362.)
after the creation of the interest, but before the commencement of the possessory right, if afterwards five years of nonclaim immediately fol-
low its commencement. (912.) But a Term (860.)
which is held in trust to attend the Reversion 2 Ventr. 329.
or Inheritance will not be affected by any alienations even by Fine, of that Reversion; for the
possession of the land by the owner as Tenant (400, 401.)

[(*a*) But now, by the 6th section of St. 3 & 4 W. 4, c.
27, the administrator shall, for this purpose, be deemed to [370, n.]
claim from the death of the testator or intestate.]

at Will to his Trustee is a virtual continuing possession of the Trustee himself. (913.) But the case is different where the Purchaser is ignorant of the existence of the Term, and it comes afterwards to be set up against him; for then from the moment of the Fine being levied, the right under the Term was adverse to the possession of the inheritance.

Ischam v. Morris, Cro. Car. 110.

(914.) These attendant Terms may also, in some cases, be set aside by a presumption of Surrender. Such a presumption stands on
(621.) somewhat different grounds from that of a Conveyance of the Fee Simple from a Trustee to
(860. n.) the beneficial owner, because there is a certain utility attributed to the preservation of these Terms; and it is usual to keep them on foot, notwithstanding that the particular purposes for which they were created may long ago have been satisfied. (915.) Hence, where it appeared that in 1727 a Term of one thousand years was created for securing a sum of money: that in 1751 provision was made for the immediate discharge of that sum; and that the Deed of 1727 afterwards came into the hands of the owner of the inheritance (which, unless a duplicate existed, showed the money to have been paid off;) and there were no subsequent traces of the existence of the term till 1802, when it was assigned by the direction of the owner of the inheritance to a new mortgagee; it was afterwards decided, (in a suit in which that Mortgagee was not interested, but where no purpose

Doe v. Scott, 11 East, 478.

of Justice could be answered by presuming a Surrender), that the Jury were rightly directed to consider the term as subsisting in 1808. (916.) It does not appear in this case that any Alienation, Mortgage, or Settlement of the inheritance, had been made between the years 1751 and 1802; but when such opportunities (especially the two former) have been suffered to pass without any recognition of the existence of the Term, the presumption in favour of its surrender is greatly strengthened. Thus where a Term had been created in 1735, became satisfied in 1750, and was never afterwards noticed, though there had been a sale of the land in 1784, another in 1791, and a third in 1792, it was held in 1821 that this Term no longer constituted any part of the Title to the Land. So where a term was created in 1711, and in 1744 a Settlement was made of the inheritance, containing a Covenant that it was free from incumbrances; this Term also was suffered to be neglected in 1821. (917.) But again it is to be observed, that in these Cases the Terms did not appear to have been ever vested in the Trustees upon an express trust to attend the inheritance, (though if they were indeed subsisting, such a trust would have been raised by implication from the circumstances.) Such an express trust must, it is conceived, have the same effect in resisting the presumption of surrender, which an express direction to surrender the term after the particular trusts should be (621.)

Ex parte Holman, Sugd. Vend. 428.

Emery *v.* Grocock, 6 Madd. 54.

Doe v. Wrighte, 2 B. & A. 710. accomplished would have in promoting it. (918.) Yet in an Ejectment where each party claimed as heir at law to the same ancestor; (which made it expedient for the purpose of justice that a Term, to the benefit of which neither could show any Title but that which he had to the inheritance, should be removed out of the way;) a Term which in 1735 was assigned upon trust to secure an annuity, (which expired in 1741,) "and after *that to attend the inheritance*," was presumed in 1819 to have been surrendered; no notice of it having been taken, nor indeed any opportunity of recognising it having occurred since 1735, except that on a sale of part of the land in 1801 a Covenant was entered into for producing the Deed which created the Term, and also the Assignment of 1735; but as these Deeds (at least the latter of them) seem to have (418, &c.) been important as evidence of the Seisin on which the Title to the inheritance depended, such a stipulation concerning them could afford no inference as to the continuance of the Term.

Doe v. Hilder, 2 B. & A. 782. (919.) In the same year (1819) a decision was made which has been regarded, not only by that part of the Profession which is most conversant with Real Property, but by a high Judicial Authority, as carrying the doctrine of presumption to an unsafe extent. In that Case, a term had been assigned in 1779 to a Trustee, to attend the inheritance; in a Marriage Settlement of the land in 1814 no notice was taken of it; (an omission which, though little advisable, is very

See Sug. Vend. 427.

far from being singular;) in 1816, *A.*, (the Tenant for life under the Settlement,) conveyed his estate to his Mother by way of Mortgage for securing a debt which he owed her; previously to which he had acknowledged a Judgment to *B.* for another debt: in 1818 *B.* sued out a Writ of Elegit upon this Judgment, and (873.)
to enforce it, brought his Ejectment against the persons in possession by title derived from *A.*'s Mother; who therefore sought to protect themselves by obtaining an Assignment of the Term, from the Administrator of the old Trustee, to a Trustee of their own nomination. Supposing the Term to have been subsisting, as it could not be affected *at law* by the Elegit, it would (884.)
have afforded a sufficient answer for the Mortgagee or her representatives, (though not so easily perhaps for *A.* himself who contracted the Debt,) to the claim of *B.* the Judgment Creditor; and the object of the Assignment was to show that the Term did still subsist. But it seems to have been here rightly decided that such an Assignment made after the Action commenced could have no weight as evidence of the Term's existence: the part of the decision which has been objected to was, that a Surrender of a Term, assigned, only forty years before, (917.)
expressly to attend the inheritance, was presumed, in consequence of the omission to recognise it in the Marriage Settlement, and in a subsequent mortgage of a partial interest created by that Settlement. An additional reason

1 T. R. 760. n. 2 T. R. 696; 7 T. R. 49; [See Doe d. Phillips v. Evans, 1 Cr. & M. 450.]

indeed was the want of evidence that any provision had been made on either occasion, by placing the Deeds relating to the Term in an unexceptionable custody, to prevent a fraudulent advantage being made of it if it really existed. And it is reported to have been said, that if it had appeared that those Deeds had been delivered to the Trustees of the Marriage Settlement, as one of the Securities for the Settlement, the case would have stood on very different grounds. The argument however which is drawn from their not having been so delivered seems to have two defects; for in the first place the retention of Title Deeds by the husband, however unsafe if he should prove dishonest, is confessedly usual; and secondly, it does not follow with any certainty, that because the Deeds were not delivered to the Trustees they must have been retained by the husband. Such an inference involves and rests upon the presumption that the estate was not in Mortgage at the time of the Settlement, and is therefore the less suited to be the foundation of another presumption. An undisclosed mortgage is perhaps as likely to exist as a concealed Surrender. And it happened that in this Case such a Mortgage did exist, and being produced at the trial of a second Ejectment brought by the parties who were defendants in the first, turned the scale of presumption decidedly in favour of the existence of the Term. This Mortgage contained a *general* declaration of the trusts of *all*

Doe v. Putland, Sugd. Vend. 421.

outstanding Terms in favour of the Mortgagee, to whom also it appeared that the Deeds relating to the Term in question had been actually delivered. (920.) However in a still later Case, such a general declaration of trusts appears to have been considered as affording no indication of the existence of the particular Term in question; for though assigned in 1785 on an express trust to attend the inheritance, which in 1793 was sold and conveyed to the Purchaser with a general declaration of this kind, the Term was yet in 1825 presumed to have been surrendered. This decision may perhaps be considered as going even beyond that of *Doe* v. *Hilder*, and therefore as marking the perseverance of the Court of King's Bench in a doctrine which has been openly disapproved by Courts of another kind(*a*). (921.) The matter may indeed be considered in some degree as raising a question of

Bartlett v. Downes, 3 B. & C. 616.

[3 Sugd. V. & P. 59, &c.]

[(*a*) In the later case of *Doe* v. *Plowman*, 2 B. & Ad. 573, the term was assigned to attend the inheritance in 1789, upon a purchase; in 1808, the property was settled on the marriage of the purchaser, reserving to her a power of appointment by deed or will; in 1813 she appointed by will. No mention was made of the term, in the marriage settlement, or in the will. On ejectment by her heir, it was held that the term could not be presumed to be surrendered. Lord Tenterden, (the same Judge who delivered the judgment of the Court in *Doe* v. *Hilder*,) inquired whether it was usual to notice such a term in a marriage settlement, and being answered by the learned counsel, (Mr. Coote,) in the negative, declared that, that being so, there was no ground for presuming that the term was ever surrendered.]

jurisdiction between the Courts of Law and of Equity; and it is to be feared that the uncertainties of Title produced by their variance will long continue to be a burden upon landed property, unless a higher power interpose to abolish these artificial interests, which owe their existence to the accidental omission of a word
(129.) in the Statute of Uses. Possibly, before the third century from the 27 H. 8. shall have been completed, the Legislature may think fit to vindicate the efficacy of its own remedial Act. In the mean while the hardly authorized half measures of the Courts of Law only increase the evil, by rendering that part of a title useless which it is yet unsafe to neglect. (922.) It seems, however, that a limit has been fixed beyond which no arbitrary presumption of Sur-
Doe v. Calvert, 5 Tau. 170. render can be made; for it has been held that a Term cannot be thus set aside within twenty years from its creation, when it is not certain that all its purposes have been satisfied. And it may be inferred that the same number of years must have elapsed since the last assignment or other direct recognition of a Term, which is subject to an express trust to attend the inheritance, before a surrender of it can in any circumstances be presumed. (923.) This last rule however may not perhaps be applicable where
(917.) there is no such express trust, although there should not be any original direction for the surrender of the Term upon its purposes being fulfilled. Such a direction indeed is not usual,

because its object is better answered by a Proviso that the Term shall cease; but it may be (851.) worthy of consideration, whether, if the Proviso should happen not to embrace in its hypothetical parts all the events in which the longer continuance of the Term might become unnecessary, it might not yet be regarded as affording to the Trustee a hint of intention, that the Term should in no case be kept on foot longer than its declared purposes required.

See Sug. Vend. 373.

(924.) The doctrine of presumption, as it regards the transfer of Terms, is not confined to cases of merger or destruction. For in a case where land had been occupied for the last seventy years, by virtue apparently of a much more ancient lease for a long Term, and that Lease was produced, the intermediate assignments necessary for completing the Title were presumed. But here, it must be observed, the Term constituted the whole ostensible Title of the persons who had been in possession of the land: had they been entitled to the inheritance, while the Term was professedly vested in a Trustee for them, the Court might possibly have been more inclined to presume a Surrender, than to restore the continuity of a broken chain of Assignments.

Earl *v.* Baxter, 2 Bl. Rep. 1228. And see 11 V. J. 350.

(925.) It appears that an Estate by Statute, Recognisance, or Elegit, may be extinguished by any act, (as a Deed of Defeasance, or of Release,) which extinguishes the debt; but if the estate have been assigned to a third person,

6 Co. 13. b. 2 Vent. 327.

(at least if with the debtor's knowledge,) that Assignee must, it is conceived, be a party to the Defeasance; though such a Deed executed by him alone might not be sufficient for the purpose, since the debt itself could not have been assigned to him.

Co.Lit.150.a. 2 Ventr. 332. (926.) It is also held, (however unreasonably,) that if a Tenant of any of these estates acquire the immediate reversion in fee of any part of the same land, whether by purchase or descent, his former estate in the whole land is extinguished.

(927.) If the owner of any such estate acquire the inheritance of the same land, but subject to a like estate interposed which is sufficient to prevent the merger or extinguishment of the first, and levy a Fine; this, though it cannot properly transfer, will extinguish his chattel interest; and the person entitled to the intermediate estate will then have a right to the possession. The same doctrine seems applicable to Terms of years properly so called.

2 Ventr. 332. See also Goodrick v. Shotbolt, Pre. Cha. 333.

(763.)

(928.) If a mere Tenant for years, or at will, levy a Fine, it does not divest the reversion, or other ulterior estate: and, unless the Conusee have an estate of freehold in the tenements, Strangers may avoid it by the Plea of "Partes "Finis nihil habuerunt." It amounts however to a forfeiture. But if the same person make a Feoffment, this in general works an extinction of the Chattel, and an acquisition of the freehold and fee simple, by Disseisin; and then a

[See 66, n.]

(95.)

(745.)

(71.)

Fine may be levied by him with effect. Yet if he continue to pay rent to the reversioner, as if nothing had happened, the Feoffment will be considered fraudulent and void: and then the Fine must also be ineffectual. Fermor's Case, 3 Co. 77.

(929.) Persons, who by virtue of old unredeemed mortgages or otherwise, have become possessed of long Terms of years, of which the Reversioners are unknown, sometimes endeavour to convert their Chattels into freeholds by the means above mentioned (*a*); and it is certainly desirable that they should have the power to do so. But as it must appear imprudent to risk the extinction of a good estate for years, upon the confidence that no reversioner will appear and take advantage of it before the five years from the last proclamation of the Fine have expired, (to say nothing of the possibility that a Settlement may have been made of the Reversion, which might protract the danger indefinitely,) it is usual in these cases to take the precaution of first assigning the Term to a Trustee, that it may be kept on foot to attend the inheritance to be acquired by the subsequent operation, and may thus afford a retreat from the Reversioner's attacks. (930.) This practice however is attended with a difficulty which seems insuperable. For in order to divest the

See 2 Sand. Us. 15, &c.; 1 Sand. Us. 40, &c.

(89.)

(860, *n.*)

[(*a*) This of course is no longer practicable. The reversioner would now have 20 years from the feoffment, to avail himself of the forfeiture occasioned thereby.] [370, n.]

estate of the Reversioner by the Feoffment, (42. 70. 302.) either the prior estate for years must be divested also, or the Tenant for years must assent of the Livery. But the Assignor, being Tenant at (401.) Will to his Trustee by virtue of an implied contract arising out of the Trust itself, cannot by his Feoffment divest the Trustee's estate, out of which his own possession continues to be derived, as long as the fiduciary relation subsists. (Doe v. Lynes, 3 B. & C. 388.) It is therefore only by the Trustee's assent that the Feoffment can be effectually made; in other words, the Tenant for years is an indispensable party to the act by which the Reversioner is disseised; and it seems to follow, that in order to that disseisin an act of forfeiture must be committed, which will give the Reversioner an immediate right of entry. (Doe d. Ld. Dormer v. Moody, 1 Sand. Us. 40; 3 B. & C. 399. n.)

Sect. 3.—*Of the Testamentary Alienation and Posthumous Transmission of Chattel Interests.*

(931.) Chattels Real are transmitted by Will in the same manner as Chattels Personal: that is, they go in the first instance to the Executor or Executors, for the payment of the Testator's debts; in order to which not only the single Executor, or all of them if more than one, but any one without the others, has an absolute (Dyer. 23. b.) power to assign and dispose of them. (932.) But if bequeathed to any person by the Will, (Doe v. Guy, 3 East. 120.) they pass to him without any Assignment, by

the mere signification of the Executor's Assent; after which, if the possession be withheld, the legatee has his remedy by Ejectment. And it seems to be immaterial whether the Chattel be 15 V. J. 581.
particularly named in the Will, or included in a general residuary bequest. (933.) Such a Residuary bequest includes the subjects of le- 8 V. J. 25.
gacies which have lapsed by the death of the (275. 279.)
legatee, and all other personal property to which the Testator may be entitled at the time of his death: for the law regards any intestacy, as to personal estate, as inconvenient. (934.) But if the residuary bequest itself fail, entirely Skrymsher v. Northcote, 1 Swanst. 566.
or in part, an intestacy to that extent cannot be avoided.

(935.) The Law does not describe any formalities of a Written Will, so far as it concerns Goods and Chattels or Personal Estate (*a*); though the Statute of Frauds 29 Car. 2, c. 3,) in ss. 19, 20, 21, 22, 23, contains several provisions relating to (*b*) Nuncupative or mere

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[(*a*) This is now no longer the case; for the late Act on [1 Vict. c. 26.]
wills applies as well to personal as to real estate. In a will, therefore, of personalty, made on or since the 1st of January, 1838, the formalities prescribed by s. 9, must be observed. (260, n.) And the several provisions of the Act respecting the revocation of wills, the attesting witnesses, the time from which the will shall speak, &c., apply to wills of personalty. (See above, p. 105, &c. in the notes.)]

[(*b*) And the provisions of the Statute of Frauds respecting nuncupative wills, are repealed. (s. 2.)

Soldiers in actual service, and mariners and seamen being at sea, were exempted from these provisions of the

oral Wills, which in consequence cannot be substantiated but by the testimony of three witnesses; nor can that testimony be received after six months, unless reduced to writing within six days after the words were spoken. (936.) The Ecclesiastical Courts, to which the whole power of determining the validity of Wills as to personal estate is confided, are in general sufficiently indulgent; regarding not so much the form of the Instrument, as its apparent completion, in whatever shape the Testator may have chosen. (937.) An Infant may make a Will at the age of eighteen, if not before (*a*). (938.) And a Feme Covert may make one with her husband's consent (*b*): but it seems that a *general* consent is not sufficient; it must be a consent to that particular Will, and if the husband survive, must continue after her

Walker *v.* Walker, 1 Meriv. 503. [See 935, n. (*a*).]
Co. Litt. 89. b. & Harg. n.

Brook *v.* Turner, 2 Mod. 170; R. *v.* Bettesworth, 2 Stra. 891.

Statute of Frauds; and by s. 11, of the late Act, they may still dispose of personal estate as before.

By St. 1 W. 4, c. 20, s. 48, &c., certain provisions are made as to the wills of petty officers and seamen in the Navy, and non-commissioned officers of marines, and marines, as regards their wages, prize money, and other monies payable for service in the Navy; and those provisions are not affected by the late Act. (s. 12.)]

[(*a*) No will, whether of personalty or of realty, made by a person under twenty-one years of age, on or since the 1st of January, 1838, is valid. (s. 7.)]

[(*b*) Her powers and disabilities in this respect seem to remain as before the Act. By s. 8, no will by a married woman shall be valid, except such as might have been made by a married woman before the Act.]

death; though where there is a general consent by Agreement before marriage, the particular consent will, in the absence of evidence to the contrary, be presumed. But if the Wife survive, her Will so made will not affect any property which she may acquire after her husband's death. (939.) It is the business of the executors to *prove* the Will by proper evidence: after which it is retained by the Court, and an authentic Copy, called the Probate, delivered to the Executors, the production of which is necessary for the assertion of their rights in any other Court, though it is not necessary that it should have been obtained before they exercise that authority of which it is the ultimate criterion.

Scammell *v.* Wilkinson, 2 East, 552.

3 Bac. Ab. 52, 53.

(940.) The Ecclesiastical Courts assert a power not only of *proving* but of *approving* Testaments; which is said to mean nothing more than taking the proofs, and decreeing their validity. They are allowed however to be the sole Judges, not only of the validity, but of the *contents of these instruments. (941.) Hence the Probate, and not the Will itself, is considered as the original: and being taken by authority, and of a public nature, a Copy of it is said to be evidence; though perhaps not in favour of the Executor himself, who if he have

Lind. 181.

Gorton *v.* Dyson, 1 B. & B. 219.

[Pinney *v.* Pinney, 8 B. & C. 335.]

12 Mod. 24; Hoe *v.* Nelthrope, 3 Salk.

* (940. *n.*) If the Will be in a foreign language, the Probate contains the words of the Original, with a Translation; but the latter is not conclusive. 1 P. W. 526.

Shepherd v. Shorthose, 1 Stra. 412. Bull. N.B. 246. Comb. 248. or 12 Vin. Ab. 100, 101.

lost the Probate may obtain an Exemplification of it. (942.) The Ledger Book of the Ecclesiastical Court appears to be a Duplicate of this Original: and it seems that the Office Copies of Wills are taken from the Ledger Book. These Office Copies are directed by St. 21 H. 8, c. 5, s. 5, to be delivered to any applicant by the persons having authority to take Probate of Testaments, or their Ministers; and yet they have sometimes been rejected when offered as evidence; but it was long ago declared that this practice ought to be altered.

Per Holt in L. of Ev. 74, or 2 Bac. Ab. 631; and see 2 Bing. 240; Cox v. Allingham, Jac. 514; [Doe v. Gunning, 7 A. & E. 240.]

(943.) After a considerable length of time, as forty years, it may be presumed, if necessary, that a person was Executor or Administrator who appears to have acted in that capacity. (944.) And in the investigation of a Vendor's Title, it is not usual after a lapse of (a) thirty or forty years, to require the recital of such a fact to be verified by the production of an Office Copy or Extract.

1 M. & S. 380.

3 Bac. Ab. 84; Doe v. Guy, 3 East, 120.

(945.) There is no particular form in which the Executor ought to signify his assent to a bequest or legacy; he may do so either by act or word. But if he be himself the legatee of a

(932.)

Doe v. Sturges, 7 Tau. 217.

[(a) The period mentioned seems somewhat scanty. In the passage referred to in the margin, the assignment by the party professing to be executrix seems to have been executed full 40 years before. There would, however, be less danger now than formerly in waving the strict proof, inasmuch as the time would run against any one taking out administration, from the death of the testator or intestate.]

[910. n.]

Chattel Real, subject to a further Executory Bequest of it to another person, his own entry upon the land will not of itself be construed as an Assent; for he must assent to both dispositions if he do to either, and it might be inconvenient to him to be thus deprived of his official power over the property by an ambiguous and perhaps necessary act.

(946.) By means of an Executory Bequest, Lampet's Case. 10 Co. 46. b.
a kind of Settlement may be made of an Estate for Years in Land, or of any other Chattel Real. Thus if Leasehold Property of this kind be bequeathed to *A.* for life, and after his death to *B.*, this is not properly a division of the Term into Particular Estate and Remainder;
for that would be inconsistent with the old (897.)
notion that an Estate for Life is of greater magnitude than any term of years; but it is a bequest of the whole Term to *A.*, subject to an executory bequest to *B.*, to take effect in the event of *A.*'s dying before the expiration of the
Term. (947.) This future interest of *B.* re- (282.)
sembles an Executory Devise of the inheritance; it cannot be defeated by any act of *A.*; and though it may be released to *A.*, it cannot
be assigned to a Stranger. (948.) If however (46.)
the bequest be to *B.* and the heirs of his body, Fearne, C. R. 460, &c.
no limited interest analogous to an estate tail is thus created; but the whole residue of the Term will vest absolutely in *B.*, or his executors or administrators; (949.) and if there be a further executory bequest to *C.* on the death

(796.) [665, n.] of *B.* without issue, this being too remote, is void. (950.) Yet if the first executory bequest had been made not to *B.* (a person ascertained) Fearne, C. R. 517. but to an unborn son of *A.*, and the heirs of the body of that son, with a further bequest in default of such issue, to *C.*; then, if *A.* happened never to have a son, the executory bequest to *C.* would take effect; though if any son of *A.* were born, the first executory bequest would immediately become absolute, and the ulterior disposition void. (951.) It appears, therefore, that in a Settlement of Chattels there may be an interest answering to a remainder expectant upon a *contingent*, but not upon a *vested*, Estate Tail. And hence, if *Freehold and Leasehold Property be disposed of in a Will, by words applicable in the same sense to

* (952.) Real and Personal Property are often included in one sweeping description: but it is to be observed that if a Testator, having Freehold Estates, make a general Devise of all his "Manors, Messuages, Lands, Tenements and "Hereditaments," this will not, without some further indication of intention, be considered as comprising any Chattel Interest which he may also possess; (*Thompson* v. *Lawley*, 2 B. & P. 303;) though if he had no freehold property, this description, even if the word "Freehold" were added (505.) to it, would become applicable to any interest which he might have in land (*a*). *Rose* v. *Bartlett*, Cro. Car. 292; *Day* v. *Trigg*, 1 P. Wms. 286.

[1 Vict. c. 26.] [(*a*) But as to wills made on or after the 1st of January, 1838, the late Act declares, that a devise of the land of the testator or of the land of the testator described in a ge-

both, and with the intention to create a like Settlement in both, the same mistake or inadvertence which, by giving an Estate Tail in the first instance instead of an Estate for Life, will render the succeeding limitations of the Freehold Property precarious, must render those of the Leasehold void. (953.) To obviate this inconvenience, the same words have sometimes received different constructions in the same instrument according to their subject matter: (954.) and though it is in general a rule that whatever words would give an estate Tail if applied to the inheritance, (whether by precise limitation, or under the Rule in Shelley's Case, or by implication,) will give the entire and absolute interest when applied to a Chattel; (955.) yet the Courts have in some cases allowed those to be words of purchase, as relating to a Chattel, which, if they related to the inheritance, would be words of limitation; (956.) and they have also been studious, in the case of Chattels, to restrict, if possible, the signification of the words "dying without issue," or the like, to a failure of issue which shall take place within some period not exceeding the

(798. 804, &c.)

Forth v. Chapman, 1 P. W. 663; Murthwaite v. Jenkinson, 2 B. & C. 357, & 3 B. & C. 191.

Fearne, C. R. 463. 478. 486.

Fearne, C. R. 490.

Fearne, C. R. 471, 478.

[See now 660, n.]

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neral manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall include his customary, copyhold, and leasehold estates, or any of such estates, to which such description (if any) shall extend, as well as freehold estates; unless a contrary intention shall appear by the will, (s. 26.)]

(665.) limits prescribed for the prevention of perpetuities; and therefore the expression "without "*leaving* issue" is here construed in its natural sense.

(957.) When there is no Will, Letters of Administration are granted by the Ecclesiastical Court to the proper applicant. The Administrator, thus constituted, derives all his authority from the Court; yet his previous acts, as far as concerns property of which he was in actual possession, though no further, are made good by his admission to the office. (958.) He has as absolute a property in the goods and chattels as an Executor; and, if there be more Administrators than one, it seems that either may act without the other; though this has been formerly denied. (959.) After payment of the expenses arising from the intestate's death, and of his debts, the Administrator is directed by St. 22 and 23 Car. 2, c. 10, (amended by St. 29 Car. 2, c. 3, s. 25, and St. 1 Jac. 2, c. 17, ss. 5, 6, 7, 8,) in what manner to distribute the residue of his personal property. This duty of distribution seems to imply that the Statute cannot operate like a Will, so as to transfer the legal estate, to the parties entitled under its provisions, upon the mere assent of the Administrator: nor perhaps does it confer any right which can be enforced in a Court of Law, except that of compelling the Ecclesiastical Court to commit Administration to one or other of those parties. (960.) If there be a Will without any appointment of Executors, Letters

1 Salk. 301; 7 T. R. 51; 5 B. & A. 745.

Kenrick v. Burges, Mo. 126; Toll. Ex. 244.

9 Co. 40.

Jacomb v. Harwood, 2 Ves. 265.

See Deeks v. Strutt, 5 T. R. 690.

(932.)

[A. of Canterbury v. Tappen, 8 B. & C. 151.]

8 East, 408.

of Administration *cum testamento annexo must be granted: and then the Will, of course, as far as it extends, is the law of Distribution.

(961.) An examined Copy from the Registry of the Court, of the Act by which Administration was granted, seems to be as good evidence (unless perhaps for the Administrator himself,) as the original Letters. Davis v. Williams, 13 East, 232. (941. 942.)

(962.) The Executor of a sole Executor, or of the survivor of two or more, provided the Will were proved by him *or in his lifetime, is Executor to the original Testator; (936.) unless he refuse that office; which he may do, while he accepts that relating to the property of his own immediate Testator, though not *vice versâ*. (964.) And it is held that, for the purpose of thus continuing the office, a Feme Covert Executrix may make a Will even without her husband's consent; (965.) though she cannot herself act without that consent, and the husband may act against her will. 3 Bac. Ab. 19; Toll. Ex. 115, &c. 3 Bac. Ab. 42; Touchst. 464. 2 East, 556. 558. (938.) 1 Salk. 306.

(966.) If the sole Executor, or all the Executors, die without proving the Will, or formally in Court refuse the office, an Administrator *cum testamento annexo* must be appointed. (967.) And if, after Probate, the sole or surviving Executor die intestate, or without Executor, a similar grant of Administration is made, but with the further qualification that it is *de bonis non administratis*. 3 Bac. Ab. 19, &c. (960.)

[* The word "or" seems to have been inserted by mistake.]

Wankford v. Wankford, 1 Salk. 299; 3 Salk. 162. [See Stacey v. Elph, 1 My. & K. 195.]

(968.) The refusal of an Executor in the Ecclesiastical Court is unavailing in the Courts of Law, if he have previously acted in the Administration of the Testator's property; a fact into which the Ecclesiastical Court* cannot inquire; and therefore wherever Letters of Administration are granted upon the refusal of Executors, there is some danger of their being void.

Hensloe's Case, 9 Co. 36.

(969.) Nor where there are several Executors, is such refusal by one of them, however attended with inaction, considered in the Courts of Law as absolutely divesting him of the office: and therefore, if he survive the others, there can be no Administrator till he be dead, or have refused again.

(957.)

(970.) An Administrator's office terminates with his life; and therefore upon the death of a sole or surviving Administrator, if any thing remains to be done, an Administrator *de bonis non*, &c. must be appointed. The Letters granted to him recite the Grant to the Original Administrator, and are evidence of it.

[967.]

Catherwood v. Chabaud, 1 B. & C. 150.

5 Co. 29. b; 3 Bac. Ab. 13.

(971.) If an Infant be made Executor, an Administrator is appointed during his minority, but with limited power. The Ecclesiastical Courts formerly granted Probate to an Executor at the age of 17; but this practice has been corrected by St. 38 Geo. 3, c. 87, ss. 6 & 7.

* (968. n.) But if the party make his renunciation in person, an oath is required from him that he has not administered; which however, if he appear by proxy, is dispensed with. Toll. Ex. 44.

(972.) Neither an Executor nor Administrator can disclaim any part of the personal property of the deceased which vests in him* by virtue of his acceptance of the office. (977.) But the Testator may appoint several Executors for different purposes, and in respect of different parts of his property; (978.) and 1 Salk. 297. (963.) Toll. Ex. 38.

* (973.) It often happens that a Testator devises Real Estates to his Executors, upon trust to sell them for the payment of his debts, or the like. Such estates come under a very different consideration from the personal property, to which alone the general rules concerning Executors are applicable. (974.) It is also not unusual, instead of devising the land to the Executors, to give them a mere power of selling it. Such a power could not formerly be exercised without the concurrence of all the Executors, although some of them had renounced the Office. Co. Litt. 112. b. 113. a. This inconvenience has been redressed by St. 21 H. 8, c. 4, (975.) which however provides only for the Case of a Power of *Sale* given by a Testator to his own Executors; and therefore if the Power be either of a different kind, or be vested in the Executors by other means, the old rule seems to be still in force. (976.) By analogy to this Statute it has been decided that, where lands are devised to several Executors for the purpose of a sale, if one of them refuse, the others may convey the whole. Co. Litt. 113. a.; *Bonifaut* v. *Greenfield*, Cro. Eliz. 80. And yet it has also been decided, that if all renounce the office, they may still convey the land. *Gibons* v. *Marltiward*, Mo. 594. And so it is in the case of a Power. Sugd. Pow. 172; App. 641. See further as to the distinction between an Estate and a Power given to the Executors, and as to the question by whom the Power may be exercised, when that is left uncertain by the Will, Co. Litt. 112. b. 113. a.; and Harg. n. ib.; Co. Litt. 236. a.; Sugd. Pow. 162. 167; *Mackintosh* v. *Barber*, 1 Bing. 50. (236.) (788.)

Toll. Ex. 106. there may in like manner be an Administrator for a specific part only. The last is commonly the case, where the Trustee of a Term of years being dead, and his executors or regular administrators likewise, the person entitled in equity to the benefit of the trust, who has hitherto been contented with his equitable title, finds occasion to fortify himself with the legal estate; which is now vested in nobody until he can procure Letters of Administration to be granted for the purpose.

(959.) (979.) In general, the right to be Administrator belongs to the husband, or wife, or next of kin of the deceased; but if the office be committed to an improper person, still the act of the Court is valid until it be repealed, and the previous acts of the Administrator stand good after the repeal; which is only a correction, by the same Court, of its former sentence. (980.) If that sentence were reversed, on appeal, by a higher Court, the case would be otherwise.

Blackborough v. Davis, 1 Salk. 38.

Packman's Case, 6 Co. 18.

(981.) But if there be an absolute want of Jurisdiction in the Court, all Probates and Letters of Administration are void. This, considering the great number, not only of Episcopal Dioceses, (each of which has its Consistory Court for this purpose,) but of exclusive Peculiar Jurisdictions interspersed among them, is a great inconvenience. (982.) Not only are the powers assigned to these districts confined within their respective limits, but where

Toll. Ex. 52.

the deceased has "*bona notabilia*," (*i. e.* goods to the value of *5l.*) in each of two dioceses within the same Province, (unless in consequence of his dying when upon a Journey,) the Jurisdiction belongs to neither Bishop, but to the Archbishop in his Prerogative Court. (983.) And every * Peculiar resembles in this respect a separate diocese; unless it be within the Diocese of the Archbishop himself; for then, being originally derived out of his bishoprick, it is exempted in this respect, both from his ordinary and extraordinary jurisdiction; and therefore if there be *Bona Notabilia* in such a Peculiar, and also elsewhere, there should be two separate grants of Probate or Administration; each of which is separately valid for the goods in that district; (985.) and so, if there be *Bona Notabilia* in both Provinces of England, or in England and Ireland. (986.) It is to be observed that where the Jurisdiction properly belongs to the Bishop, or his Peculiar, that of the Prerogative Court of the Province is not so absolutely excluded, but that its Probate or grant of Administration will be valid until repealed; and therefore Preroga-

[Doe *v.* Ovens, 2 B. & Ad. 423.]

Anon. 1 Lev. 78; Gold *v.* Strode, Carth. 148.

Price *v.* Simpson, Cro. El. 718.

Burston *v.* Ridley, 1 Salk. 39; 2 Lev. 86.

Prince's Case, 5 Co. 29, R. *v.* Loggen, 1 Stra. 74; [Lysons *v.* Barrow, 2 Bing. N. C. 486.]

* (984.) These Peculiars are to be distinguished from the Archdeaconries into which most Dioceses are divided, and in each of which the Bishop appoints a Commissary who has jurisdiction in the testamentary affairs of persons dying within that district without regard to their possessing *Bona Notabilia* in other parts of the same Diocese. *R.* v. *Yonge*, 5 M. & S. 119.

(979.) tive Administrations are in general the safest and most to be relied on. (987.) In the application of the rules just mentioned, the locality of Chattels Real * (at least if they be Terms of years, properly so called,) is ascertained by the situation of the land; (988.) that of debts secured to the deceased by Judgment, Statute or Recognisance, or by Bond or other Deed, is referred to the place where the public Record is preserved, or the private instrument deposited (*a*); (989.) but debts by simple contract (among which are included Bills of Exchange, Promissory Notes, and other securities not of Record, nor under seal,) follow the person of the debtor. (990.) The consequencc of this last rule seems to be, that if the law on the subject could be strictly enforced, very few cases would be found, at least where the property was considerable, in which any other than a Prerogative Administration could have any validity. But the defects of the Law are cured by a necessary ignorance of circumstances; in

Com. Dig. Admr. B. 4; Dyer, 305. a. marg.

1 Salk. 40; Carth. 149. 3 Salk. 164.

* (987. *n.*) A Term of years held merely upon trust, though certainly of no value to the Trustee, will yet be considered as *Bona Notabilia* by the Ecclesiastical Courts. For those Courts having no jurisdiction over Trusts, (*Ex parte Jenkins*, 1 B. & C. 655,) cannot be expected to take notice of their existence.

[(*a*) So, that of shares in a public company, (as canal shares, where made personal property by the Act of incorporation,) is referred to the Office where the books of transfer and register are kept. *Ex parte Horne*, 7 B. & C. 632.]

aid of which it is established, that the existence of *Bona Notabilia* within two Jurisdictions is never to be presumed, nor can evidence be admitted of the fact when it has not been specially alleged in the Pleadings. Stokes v. Bate, 5 B. & C. 491.

(991.) In the third part of the Schedule to St. 55 G. 3, c. 184, are contained two long lists of Stamp Duties on Probates and Letters of Administration; the latter, when there is no Will annexed, generally incurring a duty of about two and a quarter per cent, the former of about one and a half, on the whole value of the personal estate of the deceased. (992.) This value is ascertained by the oath of the person applying for Probate or Administration. In the valuation, by s. 38 of that Statute, property held merely in trust is not to be included; but no allowance is to be made in the first instance for the debts of the deceased, though by s. 51, after payment of them a corresponding part of the duty may, on application to the Commissioners of Stamps within three years, be refunded. (993.) On the other hand all debts due to the deceased are to be included; nor can *bad* debts be estimated at any other than their nominal value*. (994.) Leasehold estates 3 Tau. 116.

* (993. *n.*) Yet it has been held that in an action against an Executor, the Probate Stamp is *primâ facie* evidence of Assets in his hands. *Foster* v. *Blakelock*, 5 B. & C. 328(*a*).

[(*a*) But see now *Stern* v. *Mills*, 4 B. & Ad. 657; and what was said there as to the case of *Foster* v. *Blakelock*, p. 663, 664.]

for years, whether absolute or determinable on lives, must also be included. (995.) By s. 41, if the duty originally paid was insufficient, the Instrument may yet be re-stamped on payment of the whole duty without regard to the sum already paid, together with the same penalty as
(451.) in the case of a Deed; or upon payment of the difference only, if the Commissioners be satisfied that there was a mistake, and the application be made within six calendar months after it
Rogers v James 7 Tau. 147. was discovered: and in either case the Instrument is then to be considered as originally valid.

(996.) The above duties affect all parts of the personal estate of the deceased, (if it exceed 20*l.*) in an equal degree; and it is probable
(992.) that in many instances even that part to which his Creditors are entitled does not escape. After payment of debts, there is still an additional duty on all the residue, except what is given or devolves to a husband or wife of the deceased, or to any of the Royal Family, or consists of books or other specific articles given to be preserved by some Corporation, Society of an Inn of Court or Chancery, or Endowed School, or constitutes a legacy or share not amounting to 20*l.* (997.) This duty, where the Testator or Intestate died after the 5th April, 1805, amounts to one per cent on the amount or value (not being less than 20*l.*) of whatever becomes the portion of a lineal Relation; to three per cent on that of a Brother or Sister, or

any descendant of either; to five per cent on that of an Uncle or Aunt or their descendants; to six per cent on that of a Great Uncle or Great Aunt, or their descendants; and to ten per cent on that of every other person. The valuation made by the Executor or Administrator may here be corrected by an Appraiser appointed by the Commissioners, (St. 55 G. 3, c. 184, s. 8, and St. 36 G. 3, c. 52, s. 22.) (998.) The duty is in general to be paid by the Executor or Administrator, and the Stamp which denotes its payment is to be affixed to a Receipt given to him by the person interested, (ib. s. 5, 6, 27, and 28, &c.) (999.) Where [St. 36 G. 3, c. 52.] there is a bequest of the same property to two persons in succession, if they are both chargeable with the same duty in respect of their relation to the Testator, the duty is to be taken once for all out of the property, (ib. s. 12, 13,) but there is a special provision for the case of persons differently chargeable, (ib. s. 12, 8, 9.)

CHAP. VI.

OF INCORPOREAL TENEMENTS.

SECT. 1.—*Of Seignories and Manorial Rights.*

(1000.) BY the English Law, no subject can Co. Litt. 65. a. have land in direct or allodial dominion. The legal denomination for the highest degree of

(14. 122.) ownership, as we have seen, is, "*Fee*," (or "*Feodum*,") which implies some kind of duty (30. 214.) arising out of the old Feudal System. To this duty the King is always *ultimately* entitled; but it may be owed *immediately* to some inferior personage; and there may even be a long train of subordinated Lords between the King and the actual Tenant of the Land. This duty constitutes the *Tenure* of the Land, and the corresponding right is the *Seignory*. (1001.) But Co. Cop. s. 11. Tr. 48. Tenures are either perfect or imperfect. Wherever there is a Particular Estate and a Reversion, the former is held of the Reversioner by an imperfect tenure: wherever there is no Reversion, the Land is held of the Lord by a perfect tenure. (1002.) When, upon the creation of Co. Litt. 23. a. 143. a. an estate for Life or Years, no rent or other service is expressly reserved, the tenure is by Fealty only; in consequence of which the Litt. 130. Tenant may be obliged to take an oath to perform his services, though he has none to perform. (1003.) But it is otherwise in the creation of an Estate tail; for there in general the donee holds of his donor by the same services as the latter holds of his Lord. (1004.) The right however which answers to any of these imperfect Tenures, considered apart from any valuable services which attend and may be Co. Litt. 151. b. separated from it, is a mere incident to the Reversion; while the right which is correlative to a perfect Tenure constitutes a substantive independent Seignory.

(1005.) No such Seignory can be created at this day unless by the King. For by St. 18 Edw. 1, (called *Westminster* 3, and from its initial words, *Quia Emptores*,) all Feoffments of Land in fee simple must be so made that the Feoffee shall hold of the Chief Lord, (*Capitalis* 2 Inst. 501.
Dominus, which means the *immediate* Lord, to whom the obligation of the Tenant is most direct and personal,) by such services as the Litt. 479, 538.
Feoffor held before. (1006.) But the Lord may at any time release to the Tenant all or any part of the services; and he may also grant Litt. 226.
them to a stranger.

(1007.) By St. 12 Car. 2, c. 24, the old Military Tenures, which had many oppressive incidents, were abolished, and one Tenure only established for all the Freehold Lands * of the Laity, which is called Free and Common Socage. (1009.) This Tenure is of great antiquity, being commonly referred to the Saxon period; and its essential privilege consists in being attended with none but† certain and determinate as well as liberal or reputable services. Litt. 117, &c.

* (1008.) There is also a Tenure peculiar to Church Lands, called Frankalmoign, which has still greater immunities than Socage. Litt. s. 133, &c. This is not affected by the Statute.

† (1009. *n.*) The honorary services of Grand Serjeanty, which are to be performed to Royalty on accidental occasions, are now annexed by the Statute to the Socage Tenures into which the old Military Tenures of Grand Serjeanty have been converted; but for this purpose a special Proviso seems to have been necessary; (s. 7.)

(1010.) In most instances the service, (if any,)
(1002.) besides Fealty, consists of a trifling annual rent, which, when the land descends to an heir, is
Co. Cop. s. 22; Tr. 18. s. 25; Tr. 28. to be doubled for the first year; the Lord being then entitled to the casual profit (not properly a *Service*) called a *Relief*, which is equal to one year's rent.

Litt. 103, &c. (1011.) The right of Wardship, (or Guardianship,) of an infant heir to lands held by military tenure, was one of the incidents of the Seignory while that Tenure subsisted. The Wardship (which was more beneficial to the Lord than to the heir) continued, in the case of a male heir, to the age of twenty-one.
Litt. 123, &c. (1012). On the other hand, the right of Guardianship of an heir to Lands held in Socage (a right which devolved to a person who was next of kin to the heir, but in that line, whether
(326.) paternal or maternal, in which the lands had not descended to him, and consequently could not afterwards descend from him, and was exerciseable for the sole benefit of the heir,) continued only to the age of fourteen; when the heir might choose whom he would for his Guardian during the rest of his minority.
(1013.) The Statute (s. 8, 9,) has provided that every Father by Deed or (*a*) Will, executed in

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[1 Vict. c. 26.] [(*a*) The provisions of the late Act on Wills, are, by s. 1, extended to a disposition, by will and testament or devise, of the custody and tuition of any child, by virtue of the Stat. 12 Car. 2, c. 24.]

the presence of two witnesses, may appoint any person or persons to have the custody and management of any of his children who shall be under age and unmarried at his death, and of their real and personal estates, till their full age, or for any less time; and the persons so appointed may enforce their rights of custody of the children and possession of their property by the Actions there specified.

(1014). The Lord's remedy, when the services are not performed, is by *Distress; i. e.* by taking any goods (with some exceptions) which may be found on the Land, and detaining them as a pledge or security. Litt. 102. 213. 214.

(1015.) The Tenant, if he think himself injured by this proceeding, may complain to the Sheriff, who will cause the goods to be restored to him, under an engagement to prosecute an Action of Replevin against the Lord or his Agent, by which the right of distraining may be tried. The Justification pleaded by the Defendant in this Action of Replevin is called his *Avowry*, or, if he be a mere Bailiff or Agent, his *Cognizance*. (1016.) And by St. 32 H. 8, c. 2, s. 4, no person shall "make "any Avowry or Cognizance for any Rent, "Suit or Service, and allege any Seisin of any "Rent, Suit, or Service, in the same Avowry "or Cognizance, in the possession of his or "their Ancestors, or Predecessor or Predecessors, or in his own possession, or in the possession of any other whose estate he shall pre- 3 Black.Comm. 146, &c. (376.)

"tend or claim to have, above (*a*) fifty years "next before the making of the said Avowry

Bevil's Case, 4 Co. 8. "or Cognizance." (1017.) In explanation of

(1002.) which it may be observed, that by receiving the oath of Fealty from the Tenant, the Lord obtains Seisin of all his services; that by receiving any one annual Service, he obtains Seisin of all *Casual*, but not of other *Annual* Services; and that the Statute does not extend to such Casual Services as are likely not to become due within the period of limitation. (1018.) Services due to the *Crown* in respect of tenure seem also to be exempt from all pro-

(387.) visions of this kind; for they are virtually excepted in St. 9 G. 3, c. 16, s. 5.

Co. Tr. 38. 45; Harg. Co. Litt. 142. a. n. 2. (1019.) If the services be not performed for two years, and there be no goods on the land sufficient for the purpose of Distress, the land itself becomes forfeited; and the Lord may prosecute his right by (*b*) Writ of Cessavit, an

4 Co. 11. a. Action, which is said not to * be within the

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* (1019. *n.*) These cases, however, seem to be within the general intention of the Statute. For it could scarcely

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[370, n.] [(*a*) But now, it will be remembered, no entry or distress can be made, or action brought to recover any land or rent, but within 20 years next after the right so to do shall have first accrued. (3 & 4 W. 4, c. 27, s. 2.) But see below, 1058, n., as to the construction of this section, and as to the period within which arrears of rent may be recovered.]

[375, n.] [(*b*) The Writ of Cessavit is abolished by St. 3 & 4 W. 4, c. 27, s. 36.]

Statutes of Limitation. (1020.) Another ground of Forfeiture to the Lord, an unlicensed alienation in Mortmain, has already been mentioned. (214.) This can only be enforced by Entry.

(1021.) A no less important, but almost equally rare, fruit of Seignory, is *Escheat*. This happens when the Tenant in fee simple dies without leaving any heir to the land, and without having incurred a *Forfeiture* (as for treason) to the Crown; which as we have seen, is possible in various ways*. In such case the Lord may enter, or at any distance of time (as it is said,) recover by (*a*) Writ of Escheat. (1022.) The acquisition of Land by Escheat is not properly a purchase; for the Land thus acquired will descend as the Seignory would have descended, into the place of which it

(189.) (328. 329.) Harg. Co. Litt. 18. b. n. 2. (326.)

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have been contemplated, that a right to the Services might be lost by neglect, and that yet a right to the land as a substitute for those services should last for ever unasserted (*b*). (1021, *n.*) If, after the right of Escheat has accrued, the Lord accept any such services from a person in possession, as imply something more than a tenancy at will, this seems to be a waiver of the right. (F. N. B. 144. O.)

* See the last note.

[(*a*) The Writ of Escheat is abolished by St. 3 & 4 W. 4, c. 27, s. 36.] [375, n.]

[(*b*) The Writs of Cessavit and Escheat being abolished, these cases are now of course subject to the general limitation contained in s. 2 of the late Act, but with the savings in cases of disability provided in ss. 16, 17, 18.] [370. n.] [371, n.]

comes. This seems to show that there was originally little difference between a Seignory and a Reversion.

Co Cop. s. 31 (40.) (1023.) Lands and Seignories, anciently united, constitute a Manor. The Lands are called the Demesnes of the Manor; and of these any part may be severed from the rest by alienation, without destroying the essential integrity of the remaining aggregate. (1024.)
(1006.) So also any of the Seignories may be released or granted away, provided that there still remain two Tenants in fee simple holding of the Lord; but this number of Tenants is absolutely necessary to constitute the Court Baron without which the Manor would cease to exist. (1025.) The antiquity of union is also so essential that the King himself, it is said, cannot create a perfect Manor at this day. But two or more Manors may perhaps arise out of one by Partition between Coparceners. (1026.) A temporary separation of all the Demesnes from the Seignories, as by a Lease for years of the former, causes a suspension of the Manor; a permanent separation causes its extinction.

Co. Litt. 58. a. 117. b.; F. N. B. 1. (1027.) In the Court Baron, the Tenants in fee simple, (who are called Suitors to the Court, because the *doing suit* to or attending it is a part of the Services to which they are obliged,) are Judges both of law and fact; the Lord's Steward presiding only as Register. (1028.)

This Court may be held every * three weeks; and has jurisdiction in personal actions where the debt or damages do not amount to forty shillings, and where no fine is to be imposed upon the defendant; and also in (*a*) Real Actions, by Writ of Right, for lands held of the Manor. (1029.) The Court cannot be held out (383.) of the Manor, unless where it has been usual, time out of mind, to hold one Court for several Manors in one of them only. (1030.) The Rolls of a Court Baron, (though not properly a Court of *Record*,) or examined Copies of Bull.N.P.247; 4 T. R. 670. them, are allowed as evidence in the King's But see 1 Turn. 217. Courts; and this even where other rights than those to which they immediately relate are concerned.

(1031.) In Manors which are Ancient De- (78.) mesne, whether they belong at this day to the 4 Inst. 269; 1 Bac. Ab. 172, &c. King or to a subject, the Court Baron has the only and exclusive original jurisdiction, (subject to an appeal to the Court of Common Pleas by

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* (1028. *n.*) And therefore Suit of Court is a regular (1017.) *annual* Service. 4 Co. 9. a.

[(*a*) The 36th section of St. 3 & 4 W. 4, c. 27, which abolishes real actions, extends to all plaints in the nature of any such action, except a plaint for free-bench or dower. So that now all rights to copyhold lands, unless the right of a widow to her free-bench, must be tried, as in fact they generally were before the Act, in the superior Courts.]

Writ of False Judgment,) in all Actions relating
(1009.) to lands held of the Manor by an ancient tenure in Socage. (1032.) But if a Fine be levied or Common Recovery suffered in the Court of Common Pleas of any such land, it becomes thenceforward exempt from the peculiar Manorial jurisdiction, until the Fine or Recovery be reversed by means of a Writ of Disceit brought by the Lord for that purpose(*a*). (1033.) It is said that this reversal not only reinstates the Lord in his jurisdiction, but utterly avoids the Assurance, and restores the original Tenant to his estate (*a*). If so, it may become an important question whether this Writ of Disceit is
(502.) within the purview of St. 10 and 11 W. 3, c. 14, for limitation of time as to Writs of Error (*b*).

(1034.) Besides this exclusive cognizance of

[66, n.] [(*a*) The St. 3 & 4 W. 4, c. 74, abolishing Fines and Recoveries, enacted that where a Fine or Recovery of lands held in Ancient Demesne had been levied or suffered in a superior Court, such Fine or Recovery, upon a Writ of Disceit brought by the Lord of the Manor, should be vacated or reversed only as against the Lord, but should be valid against the conusors and vouchees and all persons claiming under them respectively. (s. 4.) And in all cases where a Fine or Recovery has been levied or suffered in the Lord's Court, after a Fine or Recovery levied or suffered in a Court of superior jurisdiction which has not been reversed, the former shall be as valid, as if the tenure had not been altered or changed. (s. 5.)]

[375, n.] [(*b*) The Writ of Disceit is abolished by St. 3 & 4 W. 4, c. 27, s. 36.]

Pleas of Land, which is thus peculiarly incident to Manors in Ancient Demesne, there are many other *Franchises*, or privileges derived from the Royal Prerogative, which are often found annexed to ordinary Manors; but most of which are of little real importance or value. (1035.) Some of these*, as the right to Deodands, or to Co. Litt. 114.
the goods of suicides or other felons, or outlaws, or fugitives from Justice, cannot be claimed without an actual † Grant from the Crown; (1037.) but others, as the right to the unclaimed goods called Treasure Trove, Waifs, Strays, and Wreck, to hold a Court Leet or View of Frank Pledge; (which is a sort of Criminal Jurisdiction;) to have a Park, a Free Warren, a Fishery; to take Royal Fishes; to keep a Fair or Market, and to take Tolls; (which last privileges are sometimes highly profitable;) may be established in the hands of a subject by mere *Prescription*.
(1038.) This is a kind of Title which, like (8.)
Custom, is founded on long usage; but it differs from Custom, (on which similar rights imposing a kind of Tax often depend,) as constituting not the law of a district, but the right of an individual. (1039.) The usage, in both

* (1035. *n.*) For a particular description of these rights, see 1 Black. Comm. 290; 2 Bl. Comm. 38; 4 Bl. Comm. 273.

† (1036.) Franchises are expressly exempted in the Act (378. 1018.)
of 9 G. 3, c. 16, for limiting the claims of the Crown to 60 years.

cases, ought to mount up as high as the 1st year of Richard I.; *i. e.* there should not be clear evidence of its commencement since that time, or of any other than a temporary interruption; but it seems that usage for the last 20 years may be regarded as amounting to *primâ facie* evidence; and it must sometimes happen that no evidence beyond living memory can be obtained(*a*). (1040.) Ancient Instruments in which

Addington *v.* Clode, 2 Bl. Rep. 989.

R. *v.* Joliffe, 2 B. & C. 54.

3 Stark. Ev. 1207.

[(*a*) The law on this subject is now altered by St. 2 & 3 W. 4, c. 71, intituled, "An Act for shortening the Time of Prescription in certain cases." The following is an abstract of its principal provisions;

No claim which may be made at common law, by custom, prescription or grant, to any right of common, or other profit or benefit to be taken or enjoyed from or upon land, except such matters as by this Act are afterwards provided for, and except tithes, rents and services, shall, where it has been enjoyed without interruption for 30 years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of 30 years; and where taken and enjoyed as aforesaid for 60 years, the right shall be deemed absolute and indefeasible, unless it appear that the same was taken and enjoyed under some deed or writing. (s. 1.)

[Bailey *v.* Appleyard, 8 A. & E. 161, & n. ib.]

No claim to any way or other easement, or to any watercourse, or the use of any water, when the same shall have been enjoyed by any person "claiming right thereto," without interruption for 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to that period; and after the like enjoyment for 40 years, the right shall be deemed

[Manning *v.* Wardell, 5 A. & E. 758.] [Bright *v.* Walker, 1 C.M. & R. 711; Monmouthshire C. Co. *v.* Harford, 16. 614; Tickle *v.*

the right is mentioned are admissible in confirmation of the proof arising from present usage;

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absolute and indefeasible, unless enjoyed under some deed or writing. (s. 2.) Brown, 4 A. & E. 369; and see s. 5 of the Act.]

Where the use of light for any dwelling-house or other building, has been enjoyed for 20 years, without interruption; the right shall be deemed absolute and indefeasible, unless enjoyed under some deed or writing. (s. 3.)

Each of the aforesaid periods shall be the period next *before some suit or action, wherein the claim or matter to which such period may relate, shall be brought into question. And no act shall be deemed an interruption, unless submitted to or acquiesced in for a year after the party interrupted had notice thereof, and of the person making or authorizing the same. (s. 4.) [Bailey *v.* Appleyard, & n. *ubi supra*.]

And no presumption shall be allowed in support of any claim, upon proof of enjoyment for a less period than that which under the Act is applicable to the nature of the claim. (s. 6.)

The time during which any person otherwise capable of resisting any claim to any of the matters before-mentioned shall have been or shall be infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by death, shall be excluded in the computation of the before-mentioned periods, except only in cases where the right or claim is declared to be absolute and indefeasible. (s. 7.)

And where any land or water, upon, over, or from which any way, watercourse, or use of water shall have been enjoyed, shall be held for any term of life, or of years exceeding three years from the granting thereof, such term shall be excluded in the computation of the said period of 40 years, in case the claim shall within three years next after the determination of such term be resisted by any person entitled in reversion (s. 8.)]

Morewood v. Wood, 14 East, 327. but whether mere hearsay or reputation can be admitted to support a private right of this kind, is very doubtful. (1041.) No right can be claimed by Custom or Prescription, which in its origin, however ancient, was evidently unlawful or unreasonable; but it is not necessary that the right should be supported by any adequate consideration of reciprocal duty now subsisting; though, if there be such duty, it must still be performed before the right can be enforced.

Rickards v. Bennett, 1 B. & C. 223; Prince v. Lewis 5 B. & C. 363. But see also Peter v. Kendal, 6 B. & C. 703; Mosley v. Walker, 7 B. & C. 40.

(1042.) Prescriptive or Customary Rights, though for the most part they cannot outlast the subject to which they are inherent, yet, when annexed to a Manor, are not in general lost by the failure of Suitors to the Court Baron. (1043.) Indeed, for many purposes, a Manor *by reputation* is regarded in the same light as an actual Manor. In particular, thestatutory power of appointing a Gamekeeper seems not to depend upon the legal perfection of the Manorial dominion.

Soane v. Ireland, 10 East, 259; 2 Stark. Ev. 928.

(1024.)

Blunt v. Grimes 4 T. R. 682.

(1044.) The uninclosed or waste land within the compass of a Manor belongs in general to the Lord; and as the Tenants have a right of Common upon this Waste, any question respecting its limits is in some degree of a public nature; for which reason traditionary reputation is clearly admissible as evidence of the *

Nicholls v. Parker, 14 East, 331.

(1040. 434.)

* (1044. n.) "It very seldom happens that a Manor ex- "tends itself over more parishes than one, though there

boundary between two Manors. (1045.) A right to any part of the Waste may however be established, against the Lord, by repeated acts of ownership; such as cutting trees, digging turf, and the like. (1046.) And it is to be observed that the soil of public Roads, running between inclosed lands, is always, *primâ facie*, to be considered as the property of the owners of those lands, the middle of the Road being the boundary between the parts assignable to opposite proprietors: but if it can be rendered probable that the lands were inclosed from the Waste subsequently to the formation of the Road, it must follow that the Lord of the Manor has a preferable claim to that which lies between them. (1047.) And in general the question of property in uninclosed land must depend greatly on the acts of ownership exercised by the several claimants; *viz.* on the priority and comparative frequency and importance of these acts, and on the extent of ground to which they can be referred; for what is done in one part of an open tract can be no evidence of title to another part, unless it be previously made probable that both parts originally belonged to the same person.

Tyrrwhitt *v.* Wynne, 2 B. & A. 554.

Grose *v.* West, 7 Tau. 39; 2 Stark. Ev. 421; and see Goodtitle *v.* Alker, 1 Burr. 133; [Scoones *v.* Morrell, 1 Beav. 251.]

Barnes *v.* Mawson, 1 M. & S. 77; Hollis *v.* Goldfinch, 1 B. & C. 205; Richards *v.* Peake, 2 B. & C. 918.

"are often many Manors in one parish." 1 Bl. Comm. 113. *Acc. Lester* v. *Kemp*, 2 Bing. 30. But see also Howman, D. Orchard, T. Barney, V. 8, Tau. 683, and Com. Dig. Advowson, A.

Blundell v. Catterall, 5 B. & A. 268.

(1048.) The (*a*) Seashore, between (*b*) high and low water-marks, is *primâ facie* the property of the Crown, but may be vested, by Grant, or Prescription, in a Subject, as it not unfrequently is in the Lord of a Manor; who may consequently prevent strangers from fishing, bathing or otherwise trespassing on it.

Scratton v. Brown, 4 B. & C. 485; R. v. Ld. Yarborough, 3 B. & C. 91; [S. C. affirmed, 5 Bing. 163]

(1049.) If by the gradual changes of nature the Shore has shifted its place, the property is still defined by the present natural boundaries of the sea; and therefore any land which the waves have slowly relinquished becomes an accession to the adjoining tenement on firm ground (*c*).

SECT. 2.—*Of Rents.*

(1050.) A RENT, such as a Subject may have according to the Common Law, consists in a right to the periodical receipt of money or

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[(*a*) Including the shore of all tidal rivers.]

[(*b*) That is, at the ordinary tides. The land which is covered only by the spring tides or unusually high tides, belongs to the owner of the adjoining tenement. See *Lowe* v. *Govett*, 3 B. & Ad. 863.]

[(*c*) And so, *pari ratione*, any land which has been slowly and by imperceptible degrees encroached upon by the sea, so as to be covered at ordinary tides, is lost to the owner of the adjoining tenement, and the Crown acquires the right of soil therein. See *Scratton* v. *Brown*, 4 B. & C. 485; *Re Hull and Selby Railway Company*, 5 Mees. & W. 327.]

money's worth, in respect of lands which are held in possession, reversion, or remainder by him from whom the payment is due. (1051.) But to the King, by virtue of his Prerogative, and in some cases to a Subject by Statute, a Rent may be due in respect of an incorporeal Tenement. (1052.) All other rights to periodical payments are mere Annuities; and though they may be made descendible to the heirs of the Grantee, and then are rightly styled hereditaments, yet they are not *Tenements*, and therefore not included in the Statute de Donis and they may be disposed of by will as Personal Estate.

Co. Litt. 142. a. 6 Bac. Ab. 4. 8, 9, 10.

Co. Litt. 2. a.

(5. 3.)

(631. 642.)

Aubin *v.* Daly, 4 B. & A. 59. (935. 936.) [and the notes.]

(1053.) A Rent then, in general, is to be considered as a fixed tribute which issues out of Land, as part of its actual or possible profits*. (1054.) Wherever this tribute is connected with a Tenure, whether perfect or imperfect, as where it is due to the Lord of the Manor, or other Chief Lord of the Fee, or to the † Rever-

Co. Litt. 47. a. 142. a.

(1001.)

Litt. 213, &c.

* (1053. *n.*) It seems that in the case of Mines it may even consist of a portion of the Ore, which is the substance of the Land itself. *Campbell* v. *Leach*, Amb. 740; *Buckley* v. *Kenyon*, 10 East, 139; *R.* v. *E. Pomfret*, 5 M. & S. 139. But see also *R.* v. *Inh. St. Austell*, 5 B. & A. 693.

† (1055.) The Lessor of a Tenant at Will cannot, to all purposes, be considered as a *Reversioner*; and if Rent be reserved upon an Agreement constituting strictly a Tenancy at Will, this is not *Rent Service*, because that would imply Fealty, which is not incident to such a tenure; but with respect to the remedy by distress, this Rent has by the

(1002.)

(1014.)

sioner, it is called Rent Service, and by the Common Law is accompanied with the right of Distress for nonpayment. (1056.) Rents not connected with Tenure were divided by the Common Law into Rents Charge, and Rents Seck; the former being, from the terms of the Grant or nature of the Agreement by which they were created, recoverable by Distress; while the latter were either destitute of that remedy in their creation, or, having been originally Rents Service, were deprived of their privilege by separation from the Seignory or
(1004.) Reversion. (1057.) But now by St. 4 G. 2, c. 28, s. 5, this distinction in respect of remedy is abolished, as to all Rents of later creation, and also as to such as, existing before that time, had been duly paid for the space of three out of the last twenty years; and the extent of the remedy, with the mode of enforcing it, under the laws then existing, is made uniform for all

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Common Law all the incidents of a Rent Service. Co. Litt. 57. b. 142. a. b. At this day, however, a Tenancy at Will, with a Rent reserved, is hardly to be met with. For though a person who takes possession of land in conse-
(338. 845.) quence of a mere Treaty or Agreement for a Lease, is Tenant at Will until the Lease be made; yet, whatever stipulation there may be in the Agreement, as to the Rent to be paid under the future Lease, it cannot be so connected with this Tenancy at Will as to enable the Landlord to distrain; though if Rent be actually paid, a Tenancy from year
(864.) to year under that Rent, instead of the Tenancy at Will without any certain duty, will thenceforth be inferred. 3 B. & C. 483: *Knight* v *Benett*, 3 Bing. 361.

such Rents Seck, and for Rents Service: though Rents Charge are still left, as is reasonable, to the discretion of the parties to their creation.

(1058.) The Right of Distress, as it concerns Rents Service and Rents Seck, is exerciseable on the day immediately following that on which the Rent becomes due, or at any subsequent time within the limitation of fifty years(*a*); provided, in the case of Rent Service, that the

Co. Litt. 47. b. and Harg. n. 6.

(1016.)

[(*a*) St. 3 & 4 W. 4, c. 27, s. 42, provides, that no arrears of rent shall be recovered by distress, action, or suit, but within six years after the same shall have become due, or after an acknowledgment in writing given to the person entitled or his agent, by the person liable to pay or his agent; while by s. 3 of St. 3 & 4 W. 4, c. 42, (which received the royal assent after the first mentioned Act,) it is enacted that all actions of debt for rent on an indenture of demise, must be commenced within 10 years after the end of that session, or 20 years after the cause of action.

The operation of these apparently conflicting enactments is not very clear; and it has been even doubted, (but it is conceived without sufficient grounds*,) whether a rent reserved on a lease comes at all within the purview of the former Act. (2 Bing. N. C. 688, 690.) It has however been decided, that as to an action for rent on an indenture of demise, the latter Act must prevail, so as to give the benefit of the more extended period. *Paget* v. *Foley*, 2 Bing. N. C. 679.]

[* By s. 1, "rent," except where the context excludes such construction, extends to all services for which a distress may be made. And it would seem that, in order to reconcile the 2nd and the 42nd sections of c. 27, so far as regards the recovery of rent, the former is to be considered to relate only to the recovery of rents-charge, or of an estate in the rent, and the latter, to the recovery of arrears. 2 Bing. N. C. 686. 691.]

Tenure still continues, and that the party distraining is entitled to the Reversion or Seignory as well as to the Rent. (1059.) And in some cases these last requisites are now partly dispensed with. For, by St. 32 H. 8, c. 37, (which seems properly applicable only where the Rent is due from a Tenant having an estate of inheritance or freehold, though in modern practice it has often been extended to Tenants for years,) persons entitled to arrears of rent in right of their deceased wives, or as having themselves been Tenants for the lives of others whom they have survived; and also the executors and administrators of deceased persons who were so entitled, or were entitled in their own rights to rents in fee simple, in tail, or for their own lives, are enabled to distrain for the arrears, so long as the lands shall remain in the possession of the Tenant who ought immediately to have paid the Rent, or of any person claiming under him. (1060.) And by St. 8 Ann. c. 14, s. 6 and 7, Rent reserved on leases for life, for years, or at will, may be distrained for within six calendar months after the determination of the lease, (and consequently of the Tenure,) if the Landlord's title continue, and the Tenant from whom the arrears became due be still in possession(*a*). (1061.) If the

Co. Litt. 162; 8 Tau. 159; 1 B. & B. 279; 2 Bing. 193.

See Nuttall *v.* Staunton, 4 B. & C. 51.

[(*a*) And now, by St. 3 & 4 W. 4, c. 42, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at

Reversion to which Rent is incident be destroyed, as by merger in an ulterior reversion or remainder, it seems that not only the power of Distress for Arrears, but the Rent itself for the future is extinguished. (1062.) But where a Lease, out of which other Leases have been derived, is surrendered for the purpose of renewal, this extinguishment is prevented by St. 4 G. 2, c. 28, s. 6. Mo. 94. 3 T. R. 402. (716. n.)

(1063.) Some goods have by the Common Law a privilege of exemption absolute or qualified from * Distress for Rent. Dogs and animals naturally wild, cannot be taken for this purpose: nor any thing in a man's actual use at the moment; nor things deposited in the course of trade, or of law, or merely trespassing upon the land without fault of their owner; (1064.) nor are beasts of the plough, sheep, or the instruments of a man's trade or (1014.) Co. Lit. 47. a. 1 Bing. 283. [Brown v. Shevill, 2 A. & E. 138.] Co. Litt. 47. b. & Harg. n. 2 & 3.

* (1063. n.) This must be distinguished from a Distress for *Damage Feasant*, which is a detention by the Tenant himself of a stranger's cattle or other goods found upon his land, with a view to satisfaction for the damage or inconvenience occasioned by them. Distresses introduced by certain Statutes for other duties than Rent also come under a distinct consideration. Harg. Co. Litt. 47. a. n. 18.

will, for arrears of rent due to him in his lifetime, in like manner as he might have done in his lifetime. And such arrears may be distrained for after the determination of the lease; but within six calendar months, and during the continuance of the possession of the tenant from whom such arrears became due.]

profession distrainable, while other things sufficient for the purpose can be found. (1065.)
1 Burr. 579.
And growing * crops, though ripe, are by the old law absolutely exempted, because they are in a state of adherence to the land: and there is also an exemption of things in such a condition, or undergoing such a process that they

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* (1065. n.) Such Crops, (with the exception of spontaneous produce, such as grass, or fruit upon trees,) have not in general the quality of Fixtures: for when the owner of the inheritance is the occupier of the land, they go, upon his death, under the name of *emblements*, not to his heir, but to his executor. 3 Bac. Abr. 64. (1066.) That those things which descend to the heir should not be distrainable, is not a particular privilege, but a consequence of the legal nature which they have acquired by annexation to the Freehold. For they also pass by a conveyance of the land, without being specified or described. *Colegrave* v. *Dias*
(873.)
Santos, 2 B. & C. 76; and they cannot, upon a judgment, be taken in execution under a *Fieri Facias*, which is a process against the goods only of the Debtor. *Winn* v. *Ingilby*,
[R. v. Inh. of Otley, 1 B. & Ad. 161; Empson v. Soder, 4 B. & Ad. 655; Wansbrough v. Maton, 4 A. & E. 884.]
5 B. & A. 625. (1067.) There are some fixtures indeed which are so far excepted from the general rule, that when introduced by the Tenant of a particular Estate, not of inheritance, they may afterwards be removed by him without incurring the penalties of Waste, and may accordingly be seized under a *Fieri Facias* issued against him. *Poole's Case*, 1 Salk. 368. But these are all contained within the two classes of things beneficial to *trade*, and ornamental furniture; (*Elwes* v. *Maw*. 3 East, 38;) and can hardly be said to be co-extensive with those classes. *Buckland* v. *Butterfield*, 2 B. & B. 54. (1068.) Fixtures do not, by a wrongful severance from the land, become liable to seizure on a *Fieri Facias*. *Farrant* v. *Thompson*, 5 B. & A. 826. Nor does a temporary severance subject them to Distress. 14 H. 8, 25. b.; 2 Bac. Abr. 343.

cannot be restored unhurt; in which class corn and hay recently cut, or even in ricks, have been included. (1069.) But by St. 2 W. and M. c. 5, s. 3, corn and hay in these circumstances are subjected to a seizure by way of Distress, though not to removal: (1070.) and at the same time by s. 2 and 3, an important alteration is made in the nature of the remedy, by empowering the person who distrains, (having left notice of the distress and of its cause at the chief Mansion House, or other most notorious place on the land,) if the Tenant do not replevy the goods within five days, to (1015.)
sell them with the assistance of the Sheriff, Undersheriff, or Constable, and two Appraisers, for satisfaction of the Rent: but by s. 5, an attempt to enforce the Act where no Rent is due, subjects the trespasser to the payment of double damages with costs of suit. (1071.) By St. 11 G. 2, c. 19, s. 8, 9, Growing Crops are also made distrainable; but this provision ex- (1057.)
tends only to the cases of Landlords or Lessors and their Tenants or Lessees for life, or some less estate.

(1072.) By the Common Law the goods dis- Co. Litt. 47. b.
trained must be impounded in some place out of the Tenant's land, but within three miles, and in the same county; things liable to damage by weather, &c. being placed under cover, and animals in a situation accessible to the owner, if the party distraining would avoid being answerable for the safety of the one and

the sustenance of the other. But now by St. 11 G. 2, c. 19, s. 10, the removal of the goods from the land is in all cases rendered
(1063, &c.) unnecessary. (1073.) By the Common Law also, though with the exceptions above mentioned, all goods found on the land which is charged with the rent may be distrained, without regard either to the ownership of the goods or to the occupation of the land; (for the land itself is indebted while the tenure subsists, whether it be in the possession of the indebted person or of another; and the goods are sufficiently connected with the land by their presence;) (1074.) yet, on the other hand, if, before the arrival of the Distrainer, the goods, even of the Tenant and personal debtor himself, have been carried off the land, the former cannot follow them. But now in the case of Landlords and their Tenants for life or for a less estate, by St. 11 G. 2, c. 19, s. 1 and 2, Goods fraudulently carried off may be seized within thirty days, unless sold to a person ignorant of the fraud; and by s. 7, power is given, with the assistance of a constable, &c. to break open doors for the purpose. (1075.) And by St. 8 Ann. c. 14, s. 1, the Landlord's right, to the extent of one year's arrears, has obtained a preference over that of other Creditors, without being exerted in an actual Distress: for no goods on the land can be taken
(1066.) in execution upon a Judgment without making satisfaction to the Landlord for one year's

Moore v. Pyrke, 11 East, 52; Jones v. Powell, 5 B. & C. 647.

Co. Litt. 161. a.

rent, or any less amount, which may be actually due. (1076.) The Act of 11 Geo. 2, (1072.) c. 19, in s. 10 (already noticed), and s. 19 et seq. also contains several provisions for facilitating and legalizing Distresses for all kinds of Rent.

(1077.) Another usual mode of enforcing the payment of Rent reserved in a Lease, or at least of preventing the *accumulation* of arrears, is afforded by the insertion of a Condition or Proviso enabling the lessor to re-enter, or, (if the Lease be for years,) making the Term to* (851.) cease without entry, on the payment being delayed beyond a fixed period. (1078.) The strictness of the Law in requiring a formal Co.Litt. 201.b. &c. demand of the Rent at the proper place and moment, before a condition thus destructive of the estate should be enforced, detracted much from the availableness of this remedy, until by St. 4 G. 2, c. 28, s. 2, the Landlord, having See Doe v. Shawcross, 3 B. & C. 752. such a title of re-entry, was enabled to recover the land by † Ejectment conducted in the man- (405. 407.)

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* (1077. *n.*) This last method is less convenient to the Tenant, as producing uncertainty in his Title; and it is in no respect more beneficial to the Landlord. The Courts of Law have accordingly shown a disposition to assimilate the effects of both modes. See *Arnsby* v. *Woodward*, 6 B. & C. 519.

† (1078. *n.*) If the Lease happen to be mortgaged, and the Mortgagee not in possession, the latter may avoid the effects of the Ejectment given by the Statute, at any time within six calendar months after the Judgment in that

ner there prescribed, without any actual entry or formal demand, provided there be half a year's rent due, and not a sufficiency of distrainable goods upon the land. (1079.) Sometimes indeed the demand is dispensed with, by a stipulation in the Lease itself; and then, independently of the Statute, the mere nonpayment of Rent enables the Landlord to maintain his Ejectment. (1080.) On the other hand, where the Lease contains no condition of re-entry, yet, if the Rent amount to three fourths of the yearly value of the land, the St. 11 G. 2, c. 19, s. 16, has provided a remedy, in case the Tenant being in arrear for a whole year's rent shall desert the premises, and leave no sufficient goods for a distress; enabling two justices of the peace, by formally putting the Landlord into possession, to annul the Lease (*a*).

Doe v. Masters, 2 B. & C. 490.

(1081.) Besides the above remedies, which are directed against the occupier of the land as such, Landlords have generally, either by the

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Action has been executed, by paying the arrears of Rent and Costs of Suit, and performing the Covenants of the Lease.

[(*a*) St. 1 & 2 Vict. c. 74, enables two Justices of the Peace to give the landlord possession, where the tenant holds over after the expiration of the tenancy; but in cases only where the tenancy is at will, or for not more than seven years, and either at no rent or at a rent not exceeding £20, and without any fine.]

Common Law or by Statute, some right of Action against their lessees personally for non-payment of Rent. By the Common Law an Litt. 58. 72.
Action of Debt for Rent lies against a Lessee [1058. n.]
for years or at will; (1082.) and by St. 8 Ann c. 14, s. 4, the same Action is given against a Lessee for life during the continuance of his estate; having before been given for the arrears, after the determination of the estate, (1059.)
by St. 32 H. 8, c. 37. (1083.) By this Action also, under St. 4 G. 2, c. 28, s. 1, is to be recovered the growing penalty imposed on a Tenant* who continues in possession after the expiration of his Term, and having received notice to quit; which is at the rate of double the yearly value of the land. (1085.) An Action of Covenant lies upon a Covenant implied (579, 846, 891.)
in the words "yielding and paying," or the 2 Bac. Ab. 65.
like, in the clause of reservation of Rent in a Lease for years; or upon an express Covenant, which is seldom omitted, in any Lease. (1086.) The obligation of an express Covenant, (581.n. 855.)
though it runs with the estate to the lessee's Taylor v. Shum, 1 B. & P. 21.
Assignee, and from him may be transferred with the estate to a second Assignee, and so on,

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* (1084.) A similar penalty, but with more ample means of enforcing it, is imposed on a Tenant who, having power to determine his lease, gives notice to his Landlord accordingly, and yet fails to deliver up the possession; for by St. 11 G. 2, c. 19, s. 18, his *Rent* is thenceforward doubled.

yet continues always in the person of the original Covenantor, who cannot divest himself of his responsibility: and the same rule applies to all other express Covenants the obligation of which runs with the land: (1087.) but the original lessee is discharged from all *implied* Covenants by his Assignment, if assented to by the Reversioner. (1088.) On the other hand, the benefit even of an express Covenant, if it be made to run with the Reversion, is confined to the owner of that Reversion for the time being, and may be extinguished with it. (1089.) Neither an express, nor, as it seems, an implied Covenant, can be created without Deed; but the Action of Debt may be grounded on a Parol Lease: (1090.) and there is a third remedy, which is confined to cases where the contract is made without Deed. This is the *Action on the Case for Use and Occupation* of the Land; in which, by St. 11 G. 2, c. 19, s. 14, any Agreement for Rent, (not being by Deed,) may be given in evidence. (1091.) And, by s. 15, a similar remedy is introduced in behalf of any Tenant for Life who has made a Lease that must expire with him; his executors or administrators being enabled to recover, in an Action on the Case, a proportional part of the Rent reserved, (whether by Deed or otherwise,) from the last Rent-day down to the moment of the Lessor's decease; for which period of the Tenant's en-

Cro. Jac. 522. Edwards v. Morgan, 3 Lev. 233.

Cro. Jac. 334. 523; Carth. 178; Wadham v. Marlow, 8 East, 314.

3 T. R. 681; 1 H. Bl. 566; 3 T R. 402.

(1061.)

Touchst. 160; F. N. B. 145.

(59. 1081.)

joyment no remuneration can otherwise be demanded (*a*).

(1092.) Anciently, both on an Action and on an Avowry by the Lessor for Rent, if the Lease were not made by Indenture, the Tenant might answer the demand by denying that the Lessor, at the time of making the Lease, had any property in the Tenement. But now, by St. 11 G. 2, c. 19, s. 22, the Lessor's original Title is in no case controvertible by the Tenant on Replevin; though the old rule continues in Actions of Debt or Covenant brought by the Landlord, which do not, like Distress and Action on the case for occupation, imply an actual enjoyment of the land by the Lessee. (1093.) And to all demands of Rent, it is a sufficient answer, that, before it became due, the Lessor's Title had expired: or that the Tenant has been deprived of the possession by the Landlord himself, or lawfully evicted by another. (1094.) Also, if the eviction be confined to a part only of the land, or if the reversion be aliened, or the Term surrendered as to

Litt. 58. (1015.) (850.)

Syllivan v. Stradling, 2 Wils. 208.

2 Bing. 11; Co. Litt. 292. b. 10 Co. 128. a.

[(*a*) By St. 4 W. 4. c. 22, the abovementioned provisions of 11 Geo. 2, c. 19, are extended to the case of a lease determining on the death of the person making it, (although not strictly tenant for life,) or on the death of the life or lives for which such person was entitled. And by s. 2, rents, annuities, dividends, and other payments thereafter to be made at fixed periods, shall be apportioned, so that on the death, or other determination of the interest, of any person interested therein, he or his representative shall be entitled to a like proportional part.]

Co.Litt.148.a.; Bliss v. Collins, 5 B. & A. 876. such part, the Rent must be apportioned, either by the Agreement of all parties concerned, or by a Jury. (1095.) If part of the Tenement be destroyed by Fire or other accident, an express Covenant of the Tenant to pay the Rent during the Term is still binding on him, though neither he nor the Lessor may be bound to repair the loss (*a*).

Belfour v. Weston, 1 T.R.310.

See Harg. Co. Litt. 57. a. n. 1.

Litt. 228, 229. (1054.) (1056,1057.) Allen v. Bryen, 5 B. & C. 512. (1081, &c.) Litt. 551. 556. 567, 568, 569. 552. (41.) Co.Litt.309.b. 315. a. 316. b.

(1096.) Rent Service will pass by a Grant of the Seignory, or Reversion to which it is incident; or it may be granted separately from either, and so become a Rent Seck, which is now attended with the remedy of Distress in almost all its advantages; and if the Rent Service were recoverable by Action of Debt, it continues to be so when reduced to a Rent Seck. (1097.) To the validity of any of these Grants the Attornment of the Tenant was formerly necessary; insomuch that if two absolute Grants were successively made of the same Seignory, Reversion, (or even Remainder,) or Rent to different persons, and the Tenant of the land attorned to the second, the first was defeated. Nor do there appear to have been any legal means of compelling the Tenant's Attornment, except where the Grant was made by Fine. (1098.) But by St. 4 Ann. c. 16,

[(*a*) It seems that no express covenant, nor even a written agreement to pay the rent, is necessary, in order to render the tenant still liable to pay the rent until the regular determination of the tenancy. See *Baker* v. *Holtzapfell*, 4 Tau. 45; *Izon* v. *Gorton*, 5 Bing. N. C. 501.]

s. 9 and 10, all Grants and Conveyances are made as valid without as they would be with Attornment, though the Tenant is permitted to pay his rent as before, until the Grantee give him notice of his right. (1099.) And by St. 11 G. 2, c. 19, s. 11, reciting that Tenants, by attorning to Strangers, may put their Landlords out of possession, all such Attornments are made void: but there is a Saving of Attornments made "pursuant to and in consequence "of some Judgment at Law, or Decree or Or-"der of a Court of Equity, or made with the "privity and consent of the Landlord or Land-"lords, Lessor or Lessors, or to any Mort-"gagee after the Mortgage has become for-"feited." (1100.) It does not appear what advantage was here contemplated as arising to a Mortgagee from the mere Attornment of the Tenant; for if his Tenancy commenced before the Mortgage, the Mortgagee is now in right become his Landlord, and by simply giving notice of that right, according to St. 4 Ann., will obtain all its benefits: while on the other hand, if the tenancy commenced by virtue of a demise from the Mortgagor, continuing in possession after the Mortgage, the Tenant* cannot throw off his relation to the latter without his consent, and it is not to be expected that he should serve two masters; though he is certainly compellable by Ejectment to deliver up the possession to the Mort-

See 4 Bing. 99.

Moss v. Gallimore, Doug. 266.

(1098.)

Alchorne v. Gomme, 2 Bing. 54.

(401, 19, 407.)

gagee (*a*). (1101.) It seems, however, that a liability may be incurred by the Tenant in consequence of Attornment to a person who is not his rightful Landlord; and therefore the payment of Rent under a mistake as to the claimant's Title is held not to amount to an Attornment.

Gregory v. Doidge, 3 Bing. 474.

(1005.1054.) (1102.) It has already been shown that, since the Statute of *Quia Emptores*, no Rent Service can have been reserved by a subject on a total alienation of his estate; nor could it ever be so reserved as to be payable to any other person than the actual Grantor of the estate in the land. (1103.) But Rents Charge and Rents Seck, as they may be created by * Grant from the owner of the land while he retains his property in it, so may they also be reserved on a total alienation; and even a reservation to a third party would probably be

Co Litt. 47. a.

Co. Litt. 143. b. 170. a.

(1038.) * (1104.) "Also a man may have a Rent by Prescrip-"tion." Co. Litt. 144. a. But it is to be observed, that no incorporeal hereditament, unless incident or annexed to some other Tenement to which the Title is first established, can be claimed by Prescription otherwise than through the medium of an uninterrupted descent. Co. Litt. 121. a. A Rent therefore of this kind seems not to be alienable, unless it be parcel of a Manor.

[(*a*) But the mortgagee in such case cannot by merely giving the tenant notice, and requiring him to pay the rent to him, entitle himself to distrain. See *Evans* v. *Elliott*, 9 A. & E. 342; and the cases there cited, as to the relative situations of mortgagor, mortgagee, and tenant.]

considered as a Grant to him. (1105.) No peculiar form of words is necessary for the creation of such Rents. Thus, if one man grant to another, that, if he be not paid 20*s*. every Christmas, he may distrain for it in certain lands of the Grantor, this annual sum, unless it be more formally charged on other lands, is a Rent Charge issuing out of those specified, (1106.) though unaccompanied indeed with the personal remedy of a * Writ of Annuity

Litt. 220. 221.

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* (1107.) This Writ of Annuity cannot be brought after an Avowry has once been made for the Rent, nor can it be prosecuted without renouncing all future right of Distress. Litt. 219. Hence it is now quite disused; (1108.) and where it is intended that the Rent should be secured by any personal engagement, the Grant is usually accompanied with a Covenant, and often with a Bond, or a Warrant of Attorney to confess Judgment for a large sum; by virtue of the two former of which an Action may be brought, in the first instance upon any default of payment; while, by virtue of the Judgment in the cases both of the Bond and of the Warrant of Attorney, Execution may be sued out for the annual payments as they become due; and in the case of the Warrant of Attorney without the intervention of a jury. (See Stat. 8 & 9 W. 3, c. 11, s. 8; *Walcott* v. *Goulding*, 8 T. R. 126; *Austerbury* v. *Morgan*, 2 Tau. 195; 2 H. Bl. 583. n.) (1109.) But of none of these remedies can the legal benefit be transferred with the Rent; though here, as in other cases of the like kind, a Court of Equity will compel the Assignor to lend his name to the Assignee for the purpose of enforcing them. In particular it seems that the Covenant of the Grantor runs neither with the Land nor with the Rent; but is merely a personal engagement between the parties. *Milnes* v. *Branch*, 5 M. & S. 411.

(1014, 1015.)

[See 1 & 2 Vict. c. 110, ss. 9, 10.]

against the Grantor; the liability to which he would have incurred by a more direct form of Grant, unless qualified by a Proviso that it should not charge his person. (1110.) So if land be devised by Will "subject to," or "charged with," or "upon condition to pay" a rent or annuity, this, (without any clause of distress,) is sufficient to create a Rent Seck, which will come within the provisions of St. 4 G. 2, c. 28, s. 5. (1111.) A Rent may be granted, with an express power of Distress, out of an Estate for years; but in whatever way it be limited it can only be a Chattel Interest; and for this reason it seems that without the clause of Distress such a Rent would be void; for before the St. 4 G. 2, there was no remedy for nonpayment of a Rent Seck, as such, except by Assize, which is confined to Freehold Interests; and the Law would not recognize a right for which it gave no remedy.

Saward v. Anstey, 2 Bing. 519; Buttery v. Robinson, 3 Bing. 392.

(1057.)

Co. Litt. 147. b. 7 Co. 23. a.

6 Bac. Ab. 18; Parmenter v. Webber, 3 Tau. 593.

(337, 402.)

(1112.) An additional remedy, often annexed to a Rent Charge, enabling the Grantee to enter upon the land and satisfy himself for the arrears out of its profits, has already been mentioned.

(867.)

(1113.) A new mode of creating these Rents, with their remedies, was introduced by the Statute of Uses, of which the 4th and 5th sections are as follows:

(127.)

4. "And where also divers persons stand and "be seised of and in any Lands, Tenements, or "Hereditaments, in fee simple or otherwise, to

" the Use and Intent that some other person " or persons shall have and perceive yearly to " them, and to his or their heirs, one annual " Rent of 10*l*. or more or less out of the same " Lands and Tenements, and some other per- " son one other annual rent to him and his as- " signs for term of life or years or for some " other special time, according to such Intent " and Use as hath been heretofore declared, li- " mited and made thereof.

5. " Be it therefore enacted by the authority " aforesaid, that in every such case the same " persons, their heirs and assigns, that have " such Use and Interest, to have and perceive " any such annual Rents out of any Lands, " Tenements, or Hereditaments, that they and " every of them, their heirs and assigns, be " adjudged and deemed to be in Possession and " Seisin of the same Rent, of and in such like " Estate as they had in the Title, Interest or " Use of the said Rent or Profit, and as if a " sufficient Grant, or other lawful Conveyance " had been made and executed to them, by such " as were or shall be seised to the Use or Intent " of any such Rent to be had, made or paid, " according to the very trust and intent there- " of, and that all and every such person and " persons as have or hereafter shall have, any " Title, Use, and Interest in or to any such " Rent or Profit, shall lawfully distrain for non- (1014, 1015.) " payment of the said Rent, and in their own " names make avowries, or by their bailiffs or

"servants make conisances and justifications, "and have all other suits, entries and remedies "for such Rents, as if the same Rents had been "actually and really granted to them, with "sufficient clauses of distress, re-entry, or "otherwise, according to such conditions, pains, "or other things limited and appointed, upon "the trust and intent for payment or surety of "such rent."

(1114.) Hence a conveyance is often made by Lease and Release, Fine, or other Common Law Assurance, to *A.* and his heirs, to the intent that *B.* may receive out of the lands an annual Rent to a certain amount, and may distrain for it when in arrear for a certain number of days, and dispose of the distress as Landlords may for rent reserved on Leases, and may also, if the Rent be in arrear for a further space of time, enter upon the land and take the profits until the arrears be satisfied; the effect of which is to give the legal estate in the Rent Charge, with its attendant remedies, to *B.*, as fully as could be done by a direct Grant to him; with this additional convenience, that a Settlement of the land, subject to the Rent Charge, may be made by the same Instrument. And thus in a Marriage Settlement a Rent
(357.) Charge is very commonly provided for the wife's Jointure.

(151, 152, 153.) (1115.) According to the rule that there cannot be a Use upon a Use, it is evident that upon a conveyance of land to *A.*, to the intent

that *B.* may receive thereout a Rent, to the use of or in trust for *C.*, only an equitable interest will be vested in *C.* (1116.) But if *A.*, being the owner of the land, were to grant a Rent out of it to *B.*, to the use of *C.*; here, by the first section of the Statute, *C.* would take the (128. 132.) legal estate. It may be objected indeed that Co.Litt.315.a. *B.* is not, strictly speaking, *seised* of the Rent, until he has received some part of it; for by the old law he could not bring an Assize for it (393.) previously to such receipt: but there seems to Co. Litt. 11.b. be no doubt that the *seisin in law*, which is Bac. Tr. 335. See 1 Sand.Us. conferred at once by the Grant, is sufficient 108; Butl. Fearne, C. R. to put the Statute in operation. (1117.) It 529. n. is said that a Rent cannot be created by Bar- 1 Bac.Ab.468. gain and Sale, because the bargainor cannot (116, &c.) be seised of a Rent issuing out of his own land: but the word "*Profit*," in s. 5, appears (1113.) to meet this objection; and it may also be considered whether the Deed, even if it contained no other operative words than "bar-"gain and sell," would not at this day be con- (43.) strued as a *Grant* to, and to the use of, the Bargainee.

(1118.) Rents, not only under the Statute of (122. 153.) Uses, but by the Common Law, may be created Fearne, C. R. 529. so as to commence at a future time, or so as to cease and revive upon contingencies; but when once created they cannot be transferred otherwise than by an immediately operative Grant. (1119.) In Leases a new or increased Rent is often stipulated as the penalty of waste or other

injurious acts committed by the Tenant: and
6 Bac. Ab. 39. both in Leases and original Grants of Rent, it has formerly been usual to provide that a fixed sum shall be payable, *nomine pœnæ*, and recoverable by the usual remedies for rent, whenever arrears are incurred beyond a certain period. (1120.) And to the same principle may perhaps be referred the modern practice of empowering the Grantee of a Rent Charge, in the
(1112.) Clause of Entry before mentioned, to continue in possession and enjoyment of the land till not only the arrears, but all the expenses incurred by their nonpayment, shall be satisfied.

(1121.) Rents Charge are in general so far from being favoured* by the Common Law that they are subject to some very inconve-
Co.Litt. 147.b. 148. a. nient incidents. If the person entitled to a Rent Charge purchase any part of the land out
(926.) of which it issues, the whole Rent is extinct; though if that part had come to him by descent,

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* (1122.) There are some cases, however, in which the
(318.) creation of such Rents is much favoured. Thus, if upon a partition between Coparceners, in order to equalize the value of the allotments, a Rent be granted to one out of the share of another; this Grant may be made without Deed, and the Rent, without any expression to that effect, carries with it a power of Distress. Litt. 252. So, if a
(349.) Rent be assigned to a Widow for her Dower, instead of a third part of the land itself. Co. Litt. 169. b. and 34. b. And
(696.) if Rent be reserved upon a Gift in Tail, and the Donee suffer a Recovery, a Distress is still incident to the Rent; though
(1056.) it can no longer be Rent Service, as the Reversion is destroyed. 5 Bac. Ab. 864.

an apportionment would have been made. (1123.) He may release a part of the Rent; but he cannot by his release exonerate a part of the land from the whole Rent, without a total extinguishment of it. (1094.) 5 Bac. Ab. 694. 713.

(1124.) If a Rent Charge in its creation be limited to the Grantee in tail without any remainder, justice obviously requires that a * Recovery suffered by him should have no greater effect than a Fine (*a*). (1126.) And if there were an ulterior limitation to another person in the form of a Remainder, it has yet been doubted whether the Recovery of the Tenant in tail would enlarge his estate into an absolute fee simple (*a*), on the ground that the two estates were not derived out of one already existing, but, being simultaneously created out of nothing, were independent of each other. (695. 700.) Butl. Fearne, C. R. 529. n.

* (1125.) That a Recovery may be suffered of a Rent arises more from the purpose than from the form of that Assurance. It is, however, as legitimately included in a Fine as Land: (Cru. Fi. 133.) and yet if a person, having only a Rent, levy a Fine (ostensibly) of the lands out of which it issues, it seems the Rent will pass. *Heliot* v. *Sanders*, Cro. Jac. 700. (615.)

[(*a*) The substitute for fines and recoveries expressly extends to rents; (s. 1;) and the power of disposition given by ss. 15, 19, would enable the tenant in tail of the rent, with the requisite consents, if any, to dispose thereof for an estate commensurate with his own estate tail, and the remainders in the rent expectant thereon, if any; but not, it is conceived, for any greater estate.] [682, n.] [3 & 4 W. 4, c. 74.]

This reasoning, it must be observed, endangers the existence of the ulterior estate, by attri-
(784. 796.) buting to it the mischievous quality of a Perpetuity.

(730.) Fearne, C. R. 305. (1127.) Though the old rule of General Occupancy did not properly extend to incorporeal Tenements, yet there was something very like it in the case of a Rent, which upon the death of the Tenant of it for the life of another, no Special Occupant being named in the Grant, naturally fell into the hands of the Tenant of the land out of which it issued: and it seems that the Rent did not thereupon become so utterly confounded with the other profits of the land, but that if any remainder were expectant upon the estate for life, it would still be sufficiently
Sugd. Pow. 195. n. supported. (1128.) It was formerly held that Executors or Administrators could not be made
(733.) Special Occupants of a Rent: but this objection seems to have been removed by the Statute of Frauds. (1229.) Rent granted in fee simple
7 Bac. Ab. 186. is not subject to Escheat, but upon failure of
(1021.) the Grantee's heirs will sink into the land from which it issues.

4 B. & C. 472, 473. (1130.) Rent, as such, is not liable to any
(436.) Rate for the relief of the Poor. But by the
(435.) Annual Land Tax Acts, (the provisions of which
See St. 4 W. & M. c. 1, ss. 5, 6, 13, 34; and St. 4 G. 3, c. 2, ss. 5, 15, 16, 32; also St. 42 G. 3. c. 116, s. 1. are now made perpetual,) the sum assessed upon every Tenement for Land Tax is to be paid by the Tenant, who may make a proportional deduction out of all Rents to which he is liable; and disputes concerning the adjustment

of this proportion are to be settled by the Commissioners; but all agreements on the subject are valid between the parties; and it has now become the general practice, both in Leases and Grants of Rent, to stipulate that no such deduction shall be made.

(1131.) By St. 42 G. 3, c. 116, s. 154, where the Land Tax has not been redeemed in due time by the owner of the Land, it may be purchased by any other person; in whose hands it is converted into a Fee Farm * Rent, with all the remedies of Rent reserved upon a Lease. [Ward v. Const, 10 B. & C. 635.] [Warner v. Potchett, 4B.&Ad.921.]

SECT. 3.—*Of Commons and Easements.*

(1132.) By the word *Common* is understood a right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another. It differs from a Rent principally in freedom of enjoyment on the one hand, and in freedom from obligation on the other; which the Law expresses by the quaint antethesis, that it lies not in *render* but in *prender*. It is also incidentally distinguished by its fruits being always taken in kind, and being in general not otherwise measured than by limiting the instruments of enjoyment.

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* (1131. *n.*) A Fee Farm Rent, it seems, is properly a perpetual Rent *Service*, Harg. Co. Litt. 143. b. n. 5. But the name is here applied to that which is evidently no more than a perpetual *Charge*.

Co.Litt.122.a.; 1 Bac. Ab. 617. (1133.) The right of this kind which most frequently occurs, is *Common of Pasture*. This may be either *Appendant*, *Appurtenant*, or *in Gross*. The right which every Tenant, the (1023.) Seignory of whose lands is an ingredient in the constituent parts of a Manor, has by the Common Law to depasture his cattle subservient to tillage and manurance, (*viz.* horses, kine, and sheep, which are thence called commonable beasts,) upon the Lord's Waste, is called *Common Appendant*. (1134.) And of this, what is called *Common by reason of Vicinage* seems Id. 620; 13 East, 350. to be only a modification; which takes place where the Tenants of two adjoining Manors have suffered their cattle to range indiscriminately over both wastes; and it seems that either Lord may put an end to it by erecting 1 Bac.Ab. 618; Cowlam *v.* Slack, 15 East, 108. a fence. (1135.) *Common Appurtenant* is that which is annexed to land by Grant from the owner of the other land in which it is to be (1038.1104.) exercised; or by Title of Prescription, which supposes a now forgotten Grant. This is not necessarily confined to commonable beasts, but often extends to others, as swine, goats, and Scholes *v.* Hargreaves, 5 T. R. 46. geese. (1136.) It is most frequently measured by the number of animals which the land, to which it is annexed, can maintain by its produce through the winter, or season in which they are excluded from the benefit of the Common. These animals are said to be *levant and couchant* on the land; an expression which seems originally to have signified, as it

does still in other instances, the abode of a single night; but in the present case has come to imply the probability of that abode being habitual. (1137.) Common appurtenant may also be subject to the more accurate measure of a certain number of animals; and then it seems that it is capable of being severed from Drury v Kent, Cro. Jac. 14.
the land to which it was originally annexed, and thus becoming Common in Gross; but common for beasts *levant and couchant*, must continue to be Appurtenant, or cease to exist.
(1138.) There cannot, it seems, be Common Benson v. Chester, 8 T.R. 396.
Appurtenant, at least by Prescription, for animals without stint or number; though such 2 Sand. Us. 26, 27.
Common may perhaps be created by Grant, so as to be inseparable from the land. (1139.) And Common in Gross may be created with or without number, and, in the former case at least, is capable of transfer without restriction.

(1140.) If one of the Tenants of a Manor 1 Bac. Ab. 628.
purchase any part of the land over which he has a right of Common Appendant, his right over the rest will continue. (1141.) So, on the alienation of any part of land which enjoys the benefit of Common Appendant or Appurtenant, (though the latter is less favoured by the old law,) the right of Common is preserved and apportioned. (1142.) But if he who is entitled to Common Appurtenant, purchase any part of the land which is subject to his right of Common, that right is extinguished for the (1121, 1123.)
whole: and so, if he release his right over any

8 T. R. 401. part of the land. But it has been justly doubted whether in any case, and especially if all persons who have Common Appurtenant in the same land concur in discharging some part of it, this legal trap should be allowed to operate. (1143.) A claim of Common by Prescription must fail, if the right appear to be derived, within time of memory, from a person who was tenant in fee simple of the land itself in which it is to be exercised; for if Common by prescription formerly subsisted, it must have been extinguished in that person by unity of possession; but still, in consequence of recent and long enjoyment, (as for the last fifty years,) a new Grant may be presumed (*a*). (1144.) And it seems that the enjoyment of the Common by means of such cattle as the claimant happens to possess, may be sufficient evidence of a right of Common for all commonable beasts.

Cowlam v. Slack. 15 East, 108.

Manifold v. Pennington, 4 B. & C. 161.

Co. Litt. 121. b. (1145.) In general every thing which is appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form "with the appurtenances," at the end of the description. (1146.) Common in Gross may also be included in a Fine; though, it is said, not in a Recovery (*b*): but if it be indeed an entailable tenement, (as it seems to be, though not capable of Feudal Tenure,) this opinion cannot be supported.

Pig. Rec. 96. (3.646. 615. 685.)

14 Vin. 106; Co. Litt. 2. b. See Dormer's Case, 5 Co. 40.

[(*a*) See now, St. 3 & 4 W. 4, c. 71, above, 1039, n.]

[684, n.] [(*b*) It seems to be within the scope of St. 3 & 4 W. 4, c. 74. See s. 1.]

(1147.) The Commoner may distrain the cattle of a stranger, as damage feasant; but against the Lord or other proprietor of the soil, for excluding him or overstocking the pasture, his remedy must be by *Assize*, or *Action on the Case*. Against his fellow Commoners he may have a Writ of Admeasurement, to ascertain the proper number of their cattle, or an Action on the Case; and the latter remedy is also available against Strangers. But the Commoner has not that direct interest in the soil which may be vindicated by an Action of *Trespass vi et armis*, or by *Ejectment*. (1148.) Actions on the Case are among those which by St. 21 Jac. 1, c. 16, s. 3, must be brought within six years after the cause of action has arisen; and if the owner of the soil, or a stranger, contrive by inclosure or other means to exclude the Commoner for twenty years, his right of entry is lost; and he must therefore have recourse to his Assize, which in ten years more may also fail him.

1 Bac. Ab. 623. 624.

(1063, *n.*)

2 Tau. 159.

(370. 376.)

Richards *v.* Peake, 2 B. & C. 918.

(1149.) The rights of the Commoner over some portion of the soil may also be extinguished by a legitimate inclosure. For by the Statutes of Merton, (20 H. 3,) c. 4, and Westminster 2, (13 Edw. 1,) c. 46, upon an Assize brought by any person claiming Common of Pasture Appendant or Appurtenant, unless by special Grant, the Jury is directed to inquire into the sufficiency of the land still left open to the Commoners, and accordingly to decide upon the propriety of the inclosure; and the erection

1 Bac. Ab. 625.

of Windmills, Sheepcotes, &c. is justified independently of such sufficiency. (1150.) By St. 29 G. 2, c. 36, amended by St. 31 G. 2, c. 41, further provisions are made respecting inclosures for the growth and preservation of timber and underwood. (1151.) And by St. 13 G. 3, c. 81, s. 17, &c.* such a majority of the Commoners as is there described may make temporary regulations as to the time of turning on and removing their cattle, &c. (1152.) But the most effectual and beneficial Acts upon this subject are those of a local nature, which in so many instances have abolished the right of Common altogether; and the General Inclosure Act of 41 G. 3, c. 109, which forms the groundwork of all the particular Acts subsequently passed for this purpose.

This Statute begins by prescribing an oath to be taken by all Commissioners under future Inclosure Acts, and disables them for five years from purchasing lands within the Parish where they are to act. By s. 3, they are empowered to fix the boundaries of Parishes and Manors. By ss. 4 and 5, they are directed to make proper surveys. By s. 6, all claimants of Common or other right to or in any of the lands to be inclosed are directed, on pain of forfeiture, to present their claims in writing, with distinct

See Doe v. Jefferson, 2 Bing. 118.

* (1151. n.) The former part of this Act relates to Arable Lands in Open or Common Fields, which are held by a number of proprietors in separate parcels, but with a right of Common running through the whole.

specifications of their interests; but by s. 7, the Commissioners are to assign the several allotments to the persons in actual possession of the tenements in lieu or in right of which such allotments are to be made, without pretending to determine any question of Title to those tenements. The ss. 8, 9, 10, 11, relate to Roads; s. 12, directs that regard be had to convenience of situation, as well as quality and quantity in making the allotments; s. 13, enables the Commissioners, upon the application of the parties interested, to lay any small allotments together, and prescribes regulations for their enjoyment in common. (1153.) By s. 14, the several shares when allotted, shall be in full satisfaction of all previous rights; and immediately after the making of the allotments,* *and the execution of the award,* or from some other time to be ascertained by a notice fixed on the Church

* (1153. *n.*) Upon this section of the Act it has been decided, that the legal estate in the Allotments does not vest before the execution of the Award. *Farrer* v. *Billing*, 2 B. & A. 171. But in most of the local Acts a power is given to the proprietors to dispose of their Allotments previously (*a*); and the exercise of this power seems to confer the legal estate on the appointee. *Kingsley* v *Young*, 17 V. J. 468, 18 V. J. 207.

[See Doe *v.* Saunders, 5 A. & E. 664.]

[See Doe *v.* Hellard, 9 B. & C. 789.]

[(*a*) And by St. 1 & 2 G. 4, c. 23, the Commissioners are empowered to give possession of the allotments before the award is executed, and the proprietors when so let into possession are enabled to distrain for rent, and to bring actions for any injury done to the premises, or to recover the possession by ejectment.]

Door, all rights of Common, &c. shall be extinguished. The *Award* here mentioned is directed by s. 35, to be drawn up by the Commissioners, as soon as conveniently may be after the Allotment shall be finished; it is to express the quantities, situations, and descriptions of the parcels allotted, with the roads, fences, and other circumstances prescribed, and the orders and regulations made by the Commissioners; it is to be written on parchment, and read and executed by the Commissioners at a meeting of the proprietors called for that purpose; and the execution of it is to be proclaimed on the next Sunday in the Parish Church, "from the time of which "Proclamation only, and not before, such Award "shall be considered as complete;" and it is to be (*a*) enrolled in one of the Courts of Record at Westminster, or with the Clerk of the Peace for the County, that recourse may be had to it for inspection; and a Copy of this Award, or of any part of it, signed by the proper Officer, shall be admitted as legal evidence; and the Award itself shall be binding and conclusive,

[(*a*) St. 3 & 4 W. 4, c. 87, supplies, *retrospectively*, the inrolment of awards which had not been inrolled or not inrolled within the time limited by the Act of Inclosure; (s. 1;) and it enables any parties interested to inrol any such award. (s. 2.) It also provides for the appointment of new Commissioners, in cases where the provisions for such appointment in the Act of Inclosure, have been neglected or not duly observed.]

unless where it is otherwise enacted; and if the Commissioners think fit to annex any Maps or Plans to the Award, they are to be enrolled with and considered as part of it. (1154.) By s. 15, the Commissioners are empowered, with (240.)
the consent in writing of the person *seised* of (129.)
any lands, &c. in the Parish or Manor, or of the husbands, guardians, &c. of persons under disability, to exchange them for other lands, &c. within that Parish or Manor, or any adjoining Parish or Place (*a*); which Exchanges must be specified in the Award; and are then declared to be for ever * valid and effectual. By s. 16, is given a similar Power of making Partition between Joint-tenants, Coparceners, and Tenants in Common. By s. 17, it is enacted, (though it does not appear with what view,) that persons neglecting or refusing to *accept* their allotments within two calendar months from the execution of the Award shall be totally excluded from all interests in the lands; but in

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* (1154. n.) Exchanges made under this Act effect a permanent substitution of land for land, but leave the Title on each side untouched; the consequence of which is that each party receives his new land disengaged from all defects in the other's Title, but subjected to those which previously existed in his own. 1 Prest. Abstr. 161.

[(*a*) And by St. 4 & 5 W. 4, c. 30, proprietors of lands lying in Common Fields are enabled, by the intervention of a Judge of Assize as the Act provides, to exchange them for other lands in the same or in any adjoining parish.]

s. 18, a provision is made for persons under disability. By ss. 30, 31, 32, Powers of Mortgage and Sale are given in various cases for raising the expenses incident to the Inclosure; and by s. 38, a Power is given to Rectors and
(218, 237.) Vicars, with consent of Bishops and Patrons, to make leases of their allotments for 21 years, under the conditions there expressed. Finally, by s. 44, it is provided that the Statute shall take effect only where the local Acts are silent (*a*).

[(*a*) By St. 6 & 7 W. 4, c. 115, open and common arable meadow and pasture lands and fields may be inclosed by the mutual consent of the proprietors. It authorizes such inclosures to be made with the consent of two thirds in number and value of the persons having rights of common or other rights therein, (s. 1,) by Commissioners to be appointed by the proprietors and persons interested as the Act directs. (s. 3.) Four-fifths in number and value of such proprietors and persons interested may agree upon any plan, admeasurement, or valuation, which shall be binding on the Commissioners, (s. 11,) or on any rules for the guidance of the Commissioners; (s. 12;) and seven-eighths in number and value may make the inclosure without the intervention of Commissioners, by the process indicated in the Act. (s. 40, &c.) Section 35 authorizes exchanges of lands lying in the open fields or adjoining thereto, for other lands in the same or any adjoining parish; and ss. 33 and 36, communicate to the lands allotted and given in exchange, the title and tenure of the original lands; and by s. 45, parties may dispose of the allotments before the execution of the award. The Commissioner's award must be inrolled as directed by St. 41 G. 3, c. 109; and the award deposited in the Parish Church;

(1155.) Common of Pasture Appendant is the only kind of Common which can be said to exist by the mere force of the Common Law. But there are other various kinds which may be established by Custom, Prescription, or Grant. Thus there may be a right of folding sheep on another's land, which is called Common of Faldage. A more important right also occurs of cutting wood for domestic and agricultural purposes, called Common of Estovers; and of digging turf or peat for fuel, which is known as Common of Turbary, and may be appendant to a house. (1156.) Of the same nature is a liberty of digging for coals and other minerals, when not accompanied with a direct interest in the substance of the land. (1157.) A right of fishing in another's water without excluding the owner is called Common of Piscary, and analogous to this is the right, (which appears sometimes to exist independently of any Franchise derived from the Crown, but it is not much favoured in Courts of Justice,) of sporting over another's land.

1 Bac. Ab. 616. &c.; 4 B. & C. 755; Grant v. Gunner, 1 Tau. 434; Harg. Co. Litt. 6. a. n. 1.

Co. Litt. 122. a. 164. b.; Chetham v. Williamson, 4 East, 469; Doe v. Wood, 2 B. & A. 724. See Harg. Co. Litt. 122. a. n. 7.

2 B. & A. 560; Moore v. Lord Plymouth, 7 Tau. 614; Pickering v. Noyes, 4 B. & C. 639.

(1037.)

(1158.) It may sometimes be difficult to distinguish a mere right of Common from an interest in the land; and yet the difference of

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(s. 51;) and the provisions of St. 41 G. 3, c. 109, and St. 1 & 2 G. 4, c. 23, so far as applicable, are to be in force for the purposes of this Act. (s. 52.)

Section 53 provides that the Act shall not authorize any inclosure within certain distances of large towns.]

legal incidents renders the distinction very important; for independently of any question as (40. 1147.) to the proper mode of Conveyance, the one is (436.) to be vindicated by Action of Trespass or Ejectment, the other by Action on the Case; and R. v. Baptist Mill Company 1 M. & S. 612. the one is also subject to Rates for relief of the Poor, which the other is not. (1159.) It is seldom indeed that any doubt can arise as to the corporeal nature of those concurrent interests which several persons may have in the same land, as Joint-tenants, Coparceners, or Tenants in Common; except perhaps where an Rex v. Inh. Whixley. 1 T. R. 137. (1151. n.) ancient Tenancy in Common has been subjected to some customary regulations as to the mode of enjoyment, similar to those usual in Commons of Pasture; which appears to be the case with what are called Cattlegates in Yorkshire. (1160.) But perplexity is more frequently occasioned by the separate and exclu- (547, &c.) sive interests * which different persons may have in the superior and inferior regions, or in the animal, vegetable, and mineral produce of the land. Thus it seems a doubtful point whe- Co. Litt. 4 b. & Harg. n. 2.; ther the Grant of an exclusive or *Several* Fish-

* (1160. *n.*) The right to any particular species of produce, if it be not accompanied with that of entirely excluding from the enjoyment of the same species all other persons, (not excepting the owner of the land,) who are not entitled to definite shares of it as Tenants in Common, is not rateable to the relief of the poor. *R.* v. *Trent and Mersey Navigation Company*, 4 B. & C. 57; *R.* v. *Churchill*, Id. 750.

ery confers any interest in the land itself at the bottom of the water: (1161.) but though land itself may pass by the name of a *Warren*, yet by a conveyance of it merely as land, a Franchise of Free Warren has been held not to pass: and the owner of the Franchise thus separated from the land may have an Action of Trespass against a stranger. (1162.) It may also be collected from the authorities that, by special Grant, the *vesture* or *herbage* of land may constitute an interest distinct from the body of the subjacent earth, and yet capable of being defended by Action of Trespass, and recovered in Ejectment; though it may be thought uncertain whether such an Interest lies in Livery. (1163.) Trees, it has been decided, may be* granted separately from the land on which they grow, without Livery of Seisin; and yet it seems that the Grantee may have an Action of Trespass for an injury done to them. (1164.) And with respect to Mines, it is clear that they may be made the subjects of Ejectment and of conveyance by Livery, if actually opened; and that an interest in Mines unopened may exist independently of any estate in the surface of the land; which interest, until reduced into actual possession, so far resembles a remainder as not to be liable to Dower; and

R. v. Inh. Old Alreford, 1 T. R. 358. Co. Litt. 5. b. Bro. Warren, 5. 7.; Cro. El. 548; [Morris v. Dimes, 1 A. & E. 654; Casamajor v. Strode, 2 My. & K. 706.] 2 Salk. 636.

Co. Litt. 4. b. & Harg. n. 1.; Burt v. Moore, 5 T. R. 329; Ward v. Petifer Cro. Car. 362.

11 Co. 49. b. Stanley v. White, 14 East, 332; Bro. Tresp. 55.

Comyn v. Kyneto, Cro. Jac. 150; Co. Litt. 6. a.; Barnes v. Mawson, 1 M. & S. 77; E. of Cardigan v. Armitage, 2 B. & C. 197; Prest. Touchst. 96; Seaman v. Vawdrey, 16 V. J. 390.

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* (1163. n.) It seems to have been held, that such a Grant necessarily created a Chattel Interest. 3 B. & C. 210; 7 Bac. Ab. 267. But see Prest. Touchst. 211. 224.

(354.) Sloughton v. Leigh, 1 Tau. 404. But see 4 East. 476. 5 B. & C. 229.

for the same reason perhaps may be considered as lying in Grant.

(1165.) Rights of *accommodation* in another's land, as distinguished from those which are directly profitable, are properly called Easements. These serve as excuses in an Action of Trespass brought by the owner of the land, and may also be actively asserted, in case of disturbance, by an Action on the Case.

14 Vin. 106. Beaudely v. Brook, Cro. Jac. 189. And see Kooystra v. Lucas, 5 B. & A. 830; Harding v. Wilson, 2 B. & C. 96. Ballard v. Dyson, 1 Tau. 279.

(1166.) Of this kind is a private right of Way. Such a Right, if in Gross, seems to be not properly a Tenement; but it may be annexed to a house or land, and made to follow it through all circumstances of ownership. The extent of the right is measured, like that of Common, by the means of enjoyment; it may be a Way to be used alone, or in company; on foot, or on horseback; with carriages, or cattle.

Howton v. Frearson, 8 T. R. 50. Hewlins v. Shippam, 5 B. & C. 221.

(1167.) The Title to it may be by Prescription, Grant, or necessary implication. The last takes place wherever the purchaser of land has no lawful access to it but through other land of the Grantor; and the thoroughfare thus implied in the Grant is called a Way of necessity. Where there is no such necessity, a permanent right of Way cannot, it seems, be created otherwise than by Deed (*a*). And it has been held

[(*a*) It seems doubtful whether a license for the unobstructed enjoyment of light and air to a new window, can be granted otherwise than by deed. See *Bridges* v. *Blanchard*, 1 A. & E. 536. See too *Blanchard* v. *Bridges*, 4 A. & E. 176, and *Garritt* v. *Sharp*, 3 A. & E. 825.]

that a Bargain and Sale is not a proper instrument for this purpose. (1168.) A Grant however will be presumed, wherever a Way has been enjoyed peaceably yet adversely, without resistance, and also without any apparent permission or other explanation of the fact, for twenty years (*a*); but the Grant thus presumed can only be co-extensive with the estate of the person to whom the use of the Way at the commencement of the period would, if illegal, have been injurious; that is, the person in actual possession of the land over which it passed; whose acquiescence, (at least if he be a Tenant for years only,) in a matter which does not affect his purse, is not allowed to prejudice the reversioner * (*b*). (1170.) On the same principle, after the disuse of a Way for twenty years, a Release of it will be presumed.

Beaudely v. Brook, Cro. Jac. 189. (1117.) Campbell v. Wilson, 3 East, 294. Daniel v. North, 11 East, 372. 3 B. & C. 339. 304.

(1171.) The right to running Water, and to Light, is acquired by mere occupancy, if continued for twenty † years without interruption (*a*)

Cross v. Lewis, 2 B. & C. 686. [Mason v. Hill, 3 B. & Ad. 39; S. C. 5 B. & Ad. 1; & 1167, n.]

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* (1169.) The same rule is applicable to the dedication of a Road to the Public. *Wood* v. *Veal*, 5 B. & A. 454. And a public right once existing, as it may be abolished by Writ of *Ad quod Damnum*, may also fail through disuse. See *R.* v. *Montague*, 4 B. & C. 598.

† (1171. *n.*) There is a custom which prevents the application of this rule to buildings in the City of London. See *Wynstanley* v. *Lee*, 2 Swanst. 333.

[(*a*) And see now the late Act 2 & 3 W. 4, c. 71, above, 1039, n.]

[(*b*) See St. 2 & 3 W. 4, c. 71, s. 7, above, 1039, n.]

from the persons the situation of whose lands enables them to obstruct its passage; provided those persons at the commencement of the period were in possession of a sufficient estate to bind the property by their acquiescence. And these rights may be lost at once by such acts as imply a total abandonment of them.

Moore v. Rawson, 3 B. & C. 332.

Mainwaring v. Giles, 5 B. & A. 356.

(1172.) The right to Pews or Seats in a Church may be claimed as appurtenant to a Messuage within the Parish, either by a Grant from the Bishop, (which is called a *Faculty,*) or by Prescription: and from long uninterrupted usage a Faculty may be presumed, though the usage appear to have commenced within time of memory. Where no such Title can be made, the right of sitting is purely of ecclesiastical cognisance.

Griffith v. Matthews, 5 T. R. 296.

(1143.)

Clifford v. Wicks, 1 B. & A. 498; Byerley v. Windus, 5 B. & C. 1.

SECT. 4.—*Of Tithes.*

(1173.) TITHES, it is well known, are of Ecclesiastical origin; though in some instances they are now no longer the property of the Church. All Tithes are either Personal, Predial, or Mixed. Personal Tithes, consisting of the tenth part of the profits of men's labour, seem to have been generally commuted for the more moderate tribute of Easter Offerings; unless in Fishing Towns, or other places where peculiar circumstances have caused a continuance of the primitive usage. The occupier of a Corn Mill may be liable to this kind of Tithe; but not a common Day Labourer, nor any Servant

6 Bac. Ab. 713. 736; and see St. 2&3 Edw. 6, c. 13 ss. 7-11.

in Husbandry; nor (of course) a Farmer, as such.

(1174.) Predial Tithes arise from the vegetable produce of Land: Mixed Tithes from the animal produce. There are no Tithes of Minerals unless by Custom. By Custom also, as in many Ancient Cities and Boroughs, a tribute may be due for a House, under the name of Tithe. Such Tithes, within the City of London, are ascertained by St. 37 H. 8, c. 12, ss. 2, 11, 18; and St. 22 and 23 Car 2. St. 2 c. 15, ss. 1, 2, 3, 10.

6 Bac. Ab. 712. 11 Co. 16.

(1175.) The occupier of land, when he gets in his crop, must set apart or distinguish every tenth Sheaf of Wheat, and of grass every tenth Cock after the first tedding; and so every tenth Cock of Barley, &c.; but is not obliged to give notice to the Tithe holder, or to take any further trouble, except that the whole crop must remain so long on the ground, after setting out the Tithe, as to afford sufficient opportunity for inspection and comparison. But the Common Law in these respects is often varied by Custom. (1176.) Tithe is not due of Oak, Ash, or Elm Trees, nor, in some parts of the Country, of other Trees there used for timber, when cut after the age of twenty years: nor are the loppings of such Trees titheable; but the underwood which springs from their stools after they have been felled is not privileged; and it is even held that if this underwood be suffered to grow for twenty years, and acquire the character of timber, it will still

6 Bac. Ab. 738. Halliwell v. Trappes, 2 Tau. 55.

6 Bac. Ab. 720. Page v. Wilson, 2 J. & W. 513.

Ford v. Racster, 4 M. & S. 130; Chichester v. Sheldon, 1 Turn. 245. See also Evans

v. Rowe, rep. by Eagle. be titheable. (1177.) The grass or other pro-
6 Bac. Ab. 715. duce * consumed by animals which are neither used in husbandry, nor afford a Mixed Tithe within the parish, is in general subject to an impost called Agistment Tithe: but this seems not to be payable for land which has yielded Tithe of Hay in the same year, though a second crop of hay would not be exempted. (1178.) By St. 11 & 12 W. 3, c. 16, made perpetual by 1 G. 1, St. 2, c. 26, s. 2, the Tithes of Hemp and Flax are fixed at 5*s.* per acre.
6 Bac. Ab. 740. (1179.) Of Mixed Tithes it may be observed, that the Milk of all Cows is to be set out every
Welch v. Uppill, 1 B. & B. 84. tenth day; and every tenth head of the young of animals, when weaned; though the right
6 Bac. Ab. 725. accrues upon its birth. Wool, Honey, and Fish taken from a Pond, are also titheable.

Id. 731; Daws v. Benn, 1 B. & C. 751. (1180.) The Law makes a further distinction between Great and Small Tithes. Corn, Hay, Peas and Beans, Tares, and in general, Wood, are Great Tithes. But all Personal and Mixed Tithes, and also Hops, Flax, Safforn, Potatoes, and sometimes, by Custom, Wood, are Small Tithes.

(1181.) By the Common Law the only remedy against the occupier of the land, for the withholding or *Subtraction* of Tithes, was
Cro. El. 607. to be sought in the Ecclesiastical Court; though if a Stranger took them away after they were set out, an Action might be brought

* (1177. *n.*) Hence Tithes may be due in respect of a right of Common. See *Steele* v. *Manns*, 5 B. & A. 22.

against him in an ordinary Court of Law. By St. 2 & 3 Ed. 6, c. 13, ss. 13, 14, & 15, the jurisdiction of the Ecclesiastical Courts is asserted, but with a saving of the control exercised over them by the King's Courts of Record, to which all questions of Title properly belong. (1182.) By s. 2, the remedy in the Ecclesiastical Court for subtraction of Predial Tithes is extended to the double value with costs of suit; while by s. 1, a forfeiture of the treble value is imposed, which, though not expressly given to the person entitled to the Tithe, is recoverable by him in an Action of Debt; and thus he has an option of remedies in the Ecclesiastical and Temporal Courts. (1183.) By several later Statutes, and ultimately by St. 53 G. 3, c. 127, and St. 7 G. 4, c. 15, any amount of Tithes not exceeding 10*l.*, or in the case of Quakers 50*l.* may be recovered by summary process before two Justices of the Peace in the County, (neither of them being Patron of the Living,) who are empowered to levy the money by Distress. (1184.) The Statute of 53 G. 3, has also regulated the proceedings of Ecclesiastical Courts; and in s. 5, has limited the period within which Actions may be brought for Tithes to six years from the time of their becoming due. (1185.) There are also remedies for the substraction of Tithes, which often involve proceedings for determining questions of Modus or Exemption, established in Courts of Equity. Of these it will be sufficient here to observed, that examined Copies of the Decrees

Co. Litt. 159. a.

6 Bac. Ab. 766. 769; 7 Bac. Ab. 518; Bp. of St. Asaph *v.* Williams, Jac. 349.

1 Phil. Ev. 359, &c.; Lady Dar-

mouth v. Roberts, 16 East, 334; 2 Bac. Ab. 620, &c. made in such Suits, are legal evidence in Actions between the same parties and their
(498, 499.) representatives and successors; and so the Answer of the Defendant may be used against him and his reprentatives; and the written Depositions of witnesses in a Suit regularly instituted, who are since dead, are available on either side.

(1186.) Land may be free from Tithe by Composition, or by Privilege (*a*). Compositions

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[(*a*) By St. 6 & 7 W. 4, c. 71, (explained and amended by St. 1 Vict. c. 69, 1 & 2 Vict. c. 64, 2 & 3 Vict. c. 62, & 3 Vict. c. 15,) provision is made for the general commutation of Tithes throughout England and Wales.

[S. 1.] Three Commissioners are appointed, styled, "The Tithe "Commissioners for England and Wales," who have power
[S. 4.] to appoint assistant Commissioners and other officers.

[S. 17.] The commutation may be made, either * voluntarily, by agreement of the owners of not less than two thirds of the land subject to tithe in the parish, two thirds of the great tithes, and two thirds of the small tithes; or else compul-
[S. 36.] sorily, by the award of the Commissioners. Such agreement or award, which must be confirmed by the Commissioners, under their hands and seal, declares the † annual sum to be paid by way of rent charge, in lieu of the great tithes and of the small tithes of the parish, collectively or severally ‡.

[S. 26.] [* Where the tithe belongs to an ecclesiastical person, the consent of the patron, or in the case of an archbishop or bishop, the consent of the Crown, signified by the first Lord of the Treasury, must be given.]

[Ss. 29, 62; 2 & 3 V. c. 62, ss. 19, 20.] [† When the tithe belongs to an ecclesiastical person, land, not exceeding 20 acres, may be given in lieu of the tithe or of part thereof.]

[S. 90; 2 & 3 V. c. 62, s. 9.] [‡ Easter offerings, mortuaries, surplice fees, tithes of fish

of this kind are often made at this day by Act of Parliament, upon the Inclosure* of Wastes

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* (1186. n.) The St. 2 & 3 Edw, 6, c. 13, s. 5, where lands naturally barren are improved and made productive, exempts them from Tithe for seven years. See 6 Bac. Abr. 742; *Warwick* v. *Collins*, 2 M. & S. 349; 5 M. & S. 166; *Lord Selsea* v. *Powell*, 6 Tau. 297.

Valuers are then to be appointed as directed in the Act, to apportion this rent-charge amongst the several lands in the parish, or in case of neglect for six calendar months, the Commissioners may themselves apportion.

The rent-charge, which is in fact a corn-rent, and is payable half-yearly, is estimated as so much wheat at *7s.* 0¼*d.*, barley at *3s.* 11½*d.*, and oats at *2s.* 9*d.*, per bushel, as the sum so agreed upon or awarded, divided into equal thirds, would purchase. Annual averages of the prices of wheat, barley and oats, are directed to be published in the London Gazette, and every half-yearly payment from time to time of the rent-charge, is to be regulated by the then next preceding average. [S. 57; 1 V. c. 69, s. 7.] [3 V. c. 15, s. 20.]

The apportionment must in like manner be confirmed by the Commissioners, and two copies thereof under their seal are to be deposited, one in the registry of the diocese, and the other with the incumbent and churchwardens, and all persons interested may have access to any such copy, and be furnished with copies and extracts§. From the 1st of January following the confirmation of the apportionment, [S. 63, 64.] [S. 67.]

and fishing, personal tithes, other than the tithe of mills, mineral tithes, payments instead of tithes in London, and permanent payments rated on houses or lands in any city or town by custom or Act of Pariament, and lands where the tithes are perpetually commuted or extinguished by Act of Parliament, are not affected by the late acts, unless by special agreement.] 1173,1174.]

[§ Every recital or statement in, or plan annexed to, the confirmed apportionment, or any sealed copy thereof, is satisfactory evidence of the matters recited or stated, or of the accuracy of the plan.] [S. 64.]

2 P. Wms. 573. or open Fields. (1187.) And before the St. 13 Eliz. c. 10, the same thing might be effected by a Deed in which the Parson, Patron, and Ordinary joined. Though secondary evidence of such a Deed may be adduced when it appears to have been lost, its existence can never be presumed against the church within the period of legal memory. (1188.) But the constant payment or performance of a fixed tribute or service in lieu of Tithes is evidence of a pre-

Heathcote v. Mainwaring, 3 Bro. C. C. 217; and see 2 H. Bl. 263.

the lands are exempt from tithe, and the rent-charge is payable in lieu thereof*.

[S. 72.] Provision is made for the alteration of the apportionment, at any time after its confirmation, on the application of the land-owner, by the commissioners of land tax for the county or place where the lands lie. Counterparts of the instrument of altered apportionment are to be deposited in the same custody as the copies of the original apportionment; and it is to be taken as an amendment thereof.

[S. 71.] Any person having any interest or incumbrance in or upon the tithe before the passing of the Act, shall have the same right or claim to or upon the rent-charge; and every estate for life or greater estate therein shall be deemed an estate of freehold, subject to the same liabilities and incidents as the like estate in the tithes; and the rent-charge shall not merge in any estate, which the person entitled thereto may have in the land†.

[S. 80.] A tenant paying the rent-charge may deduct it from his
[S. 86.] rent; and the rent-charge is apportionable under St. 4 & 5 W. 4, c. 22, (above, 1091, n.)

[Ss. 81, 82.] Powers of distress and of entry are given to enforce payment of the rent-charge when in arrear; but not more than two years' arrear can be so recovered.]

[3 V. c. 15, s. 1; &c.] [* Or they may, under certain circumstances, be declared exempt previously to the confirmation of the apportionment.]

[† As to how the rent-charge may be merged, see below, 1214, n.]

scriptive or Customary Composition, originating before the time of memory, which is called a *Modus*. (1189.) To this the general rules relating to Prescriptions and Customs are applicable, with some variation (*a*). It is essential, (1038, &c.)

[(*a*) But now, any prescription or claim of *modus decimandi*, or of exemption of or discharge from tithes, where the tithes in kind shall be demanded by the king or any lay person, not being a corporation sole, or by any body corporate, temporal or spiritual, shall be deemed valid on shewing, in case of *modus decimandi*, the payment or render of such *modus*, and in cases of exemption or discharge, the enjoyment of the land without payment or render of or in lieu of tithes for 30 years next before the time of such demand, unless such payment or render, or enjoyment, shall be shewn to have commenced at some time prior to such 30 years, or to have been under some deed or writing; and if such proof shall be extended to the period of 60 years before the time of such demand, the claim shall be deemed indefeasible, unless such payment or render, or enjoyment shall be shewn to have been under some deed or writing. And where the tithes in kind shall be demanded by any corporation sole, spiritual or temporal, the prescription or claim shall be indefeasible, on shewing such payment or render made or enjoyment had as aforesaid, during the time that two persons in succession shall have held the office or benefice in question, and for three years after the appointment of a third person thereto; and if the time of such two holdings be less than 60 years, then, during such further number of years, either before or after, or partly before and partly after such time, as shall, with such time, make up 60 years, and for three years after the appointment of such third person; unless such payment or render, or enjoyment was under some deed or writing. (s. 1.) [St. 2 & 3 W. 4, c. 100.]

No presumption is to be allowed in favour of any claim, upon proof of the exercise and enjoyment of the matter claimed for any less period than that which, according to

6 Bac. Ab. 745; Roberts v. Williams, 12 East, 33; Short v. Lee, 2 J. & W. 464; [Gronow v. Edwards, 2 R. & My. 102.]

in particular, that the benefit accruing from the Modus, in lieu of Tithes, should be certain and invariable; and if it consists of money, (as is most frequently the case,) it must not far exceed the probable value of the Tithes in those ancient times before money became abundant.

1 Phil. Ev. 250. (1044.) (431.)

(1190.) A Customary Modus which extends through the whole parish, may be supported by evidence of general reputation; and on the other hand, in all questions of exemption, the private memorandums of a deceased Rector or Vicar relating to the receipt of Tithes are admissible on behalf of the successor.

Id. 269; and Short v. Lee, *ub. supr.*

(1191.) But the best evidence in these cases is generally to be found in the Terriers of the Parish; which are inventories of the Rights of the Church, deposited from time to time in the Registry of the Bishop or Archdeacon. To make these admissible in favour of the Parson,

1 Phill. Ev. 418, &c.

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the Act is applicable to the case and the nature of the claim. (s. 8.)

The Act does not extend to any case where, at the passing of the Act, there was subsisting a demise of, or composition in writing for the tithes, for life or years, and where an action or suit shall be commenced for recovery of the tithes in kind, within three years after the determination of such demise or composition; (s. 4;) and it excludes from the computation of the aforesaid periods, the time during which the right to the tithes shall be in the occupier of the land or person entitled to the rent; and also the time during which any person otherwise capable of resisting the claim, shall be infant, non compos, feme covert, or tenant for life, and during which any action or suit shall have been pending and diligently prosecuted till abated by death. (ss. 4, 5, 6.)]

they must bear the signature of the Churchwardens or other substantial Inhabitants; but it does not appear necessary that they should be signed by the Parson, though without that circumstance they may have less force as evidence against the Church. (1192.) If a Verdict has been given in a former suit relating to the Tithes of the same land, it is admissible as evidence, although no connexion be established between the Titles of the Tenant who was Defendant in that Suit and of the present Tenant. And the same rule seems applicable to the admissibility of the recorded proceedings of a Court of Equity.

Benson v. Olive, 2 Gwill. 701; Travis v. Chaloner, 3 Gwill. 1237. (498. 1015.)

(1193.) The benefit of these immemorial Compositions is the utmost exemption from Tithe which, independently of actual Contract, the Common Law allowed to any Lay Subject. But Ecclesiastical Persons, and the King, were privileged to enjoy a more absolute exemption on various grounds, which seem to be all reducible either to the Title of Prescription, or to the decree of the Council of Lateran in the year 1215. (1194.) This Decree, though made in the reign of King John, and therefore within the time of memory, yet, being * allowed by

Hardr. 315.

2 Inst. 652.

* (1195.) It is otherwise with the Pope's Bulls, which, according to Lord Coke, never had any legal validity in this country. But if the alleged exemptions do not appear to have originated since the accession of Rich. I. in 1189, all inquiry into the lawfulness of its commencement is precluded: and the Bull, it is conceived, may be good evidence

the general consent of the realm, became part of the English Law. Its effect indeed seems to have been rather to narrow the grounds of exemption already recognised, than to introduce any new one. (1196.) The Orders of Cistertian Monks, Knights Templars, and Knights Hospitallers, (or of Saint John of Jerusalem,) are hereby discharged from the payment of Tithes for such of their * lands as they cultivate with their own hands or at their own expense. This discharge therefore never extended to their lessees; though it was otherwise in the case of a more complete discharge by Prescription. (1197.) But even lands absolutely Tithe-free by Prescription, if aliened for an estate of inheritance, became subject to Tithe while that estate continued; and therefore an alienation in fee simple extinguished the privilege. Hence the lands of the Templars, which, after the dissolution of that order in 1311, were added by St. *7 Edw. 2, St. 3, to the possessions of the Knights of Saint John; the lands held by Foreign Monasteries in this Country, which were taken from them by

Wright *v.* Wright, Cro. El. 511; 3 Burr. 1276.

Sydowne *v.* Holme, Cro. Car. 422; Page *v.* Wilson, 2 J. & W. 513; Penfold *v.* Groome, Id. 534.

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of a prior exemption. The exemplification of a Bull, under the Bishop's seal, has been allowed to be given in evidence. Hardr. 118. And the Courts in general seem to have been more indulgent in this matter than the famous author of the Institutes. See Com. Dig. Dismes, E. 7.

* (1196 *n.*) Lands afterwards acquired did not partake
(1022.) of this privilege: but it seems that for this purpose Escheat is not to be considered as a new acquisition. Harg. Co. Lit. 18. b. n. 2.

a Statute of 2 Hen. 5, and the lands of our own Lesser Monasteries, which were confiscated by St. 27 H. 8, c. 28, appear now to be universally liable to Tithe. (1198.) With respect to the last-mentioned Statute, the clause in s. 1, that the King should have and enjoy the lands in as large and ample manner as the Abbots, &c., has been decided not to extend to any exemption from Tithe. But the Statute 31 H. 8, c. 13, by which the possessions of the Greater Monasteries were conveyed or confirmed to the King, provides, in s. 21, by express words, for the continuance of their exemptions. And as the whole Statute appears to be framed with a view to further confiscations, it has been decided that this clause extends to the lands of the Knights of Saint John, given to the King in the next year by * St. 32 H. 8, c. 24, which does not contain any words for this purpose. (1199.) The general result at this day, as to land which is in lay hands, appears to be, that if it be shown to have belonged to a Religious House included in the purview of St. 31 H. 8, c. 13, (for which purpose the Survey taken at the Dissolution, and other public documents, are available,) and that it has not usually yielded Tithes, or at least not while in the occupation of the owner of the † inheritance, it must be concluded to be

Cro. Jac. 608.

6 Bac. Ab. 756.

2 Co. 48. b.; Nash v. Molins, Cro. El. 206; Lamprey v. Rooke, Amb. 291.

3 Stark. Ev. 1426.

* (1198. n.) See also as to Chantries, Colleges, &c. St. 37 H. 8, c. 4, and 1 Edw. 6. c. 14.

† (1199 n.) It has been doubted whether land which belonged to the Cistertians or Hospitallers is tithe-free in the

legally Tithe-free in the manner represented by the evidence; unless on the other side the acquisition of the land by the Religious House, or the commencement of its actual exemption, be shown to have taken place since the accession of Rich. I., or, in the case of the Cister-
(1039,1194.) tians and Hospitallers, since the Council of Lateran.

(7.) (1200.) The Right to Tithes, as to other things under the Common Law, is grounded partly on Reason, and partly on Usage: which last, though perhaps of casual origin, must now bear a reason in itself, if it tend to settlement and peace. The original reason of an impost for the support of the Ministers of Religion, is sufficiently obvious; and the rejection of such
1 Cor. c. 9. a provision is certainly no point of Christian doctrine. But that this impost should consist of the tenth part of the produce of the soil, though of Divine institution in the Levitical Law, yet when first established in Christendom could be reasonable only so far as it was expedient. Perhaps however it was not unwise, at that time, rather to rest on an imperfect analogy, than to attempt the solution of so extensive and complicated a question, and whatever inconveniences may have ensued, it is clear that

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hands of a Tenant for life. But the question seems to have been finally decided in the affirmative, at least with respect to a Tenant for life under a Settlement, in the case of *Hett* v. *Meeds*. 4 Gwill. 1515.

no attempt ought now to be made for their removal, without duly weighing the danger of removing with them the landmarks of property, and of misappropriating to ordinary uses what has once been consecrated to objects of permanent and paramount importance.

(1201.) It appears that the people of England were anciently permitted to bestow their Tithes, or the greater part of them, on Churches of their own choice. But about the year 1200, by a Decretal Epistle of Pope Innocent III. to the Archbishop of Canterbury, which was adopted into our Law, they were directed to pay them entirely to their own parish Churches. From this time therefore the Tithes arising within every Parish became united in Title to the Church and Glebe, and vested in the Parson or Rector; (1202.) except that in some places, from the uncomplying disposition, it may be supposed, of the landholders, the Rector of one Parish has become entitled to what is called a *Portion* of Tithes arising within another. Such a right is evidently of a prescriptive nature, and depends upon evidence of actual enjoyment; (1203.) while the general right which the Rector has by the Common Law rests upon the simple fact of the lands being within the boundaries of his Parish. These boundaries may be ascertained by reputation, or by the unresisted acts or claims of Parochial Authorities, and particularly by the yearly perambulations usually made for that

2 Inst. 641.

Barnes v. Messinger, 13 East, 251.

(1038.)

1 Phill. Ev. 249.

(1044.)

purpose (*a*). (1204.) Some places are not in-
2 Inst. 647. cluded within any Parish, and of these the
Tithes belong to the King by his Prerogative.
(1193.) (1205.) By the Common Law the Right to
6 Bac. Ab. 726. 752. Tithes could not be vested in any lay Subject,
though it might be *extinguished* by virtue of a
Grant to the owner of the land. But the Reli-
1 Bl. Comm. 384. gious or Monastic Corporations contrived in
numerous instances to appropriate to themselves
the profits of Churches to which they had the
right of Presentation, and, providing as they
might for the performance of the rectorial duties,
to vest the Rectory itself in their own body
politic and spiritual, to the great refreshment
(208.) of its mortified natural members. (1206.) The
extreme abuses of this practice gave occasion
to the St. 4 H. 4, c. 12, by which it was en-
acted that "in every Church so appropiated or
"to be appropriated, a Secular person should
"be ordained Vicar Perpetual, canonically in-
"stituted and inducted in the same, and con-
"veniently endowed by the discretion of the
"Ordinary, to do Divine Service, and to in-
"form the people, and to keep hospitality
"there." This is the origin of all the Vicar-
ages existing at this Day; in which the Title
of the Vicar to Tithes or other ecclesiastical
emoluments always depends primarily upon the

[(*a*) The Tithe Commissioners are empowered, in certain cases, to adjudicate on parochial boundaries. See 1 V. c. 69, ss. 2, 3; 2 & 3 V. c. 62, ss. 34, 35; 3 V. c. 15, s. 28.]

Endowment, which was made at the discretion of the Ordinary, in pursuance of the Statute; (1207.) though, as the Rector and Vicar were persons equally capable by law of holding such property, the Deed of Endowment seems never to be conclusive in any question between them, but a variation of it by some subsequent instrument may be presumed in favour of long enjoyment by either party. (1208.) Most Vicarages are endowed with the Small Tithes of the Parish, and many of them with a part of the Great Tithes. But the Glebe Lands of the Rector, so long as they continue in his own occupation, are exempt from all Vicarial Tithes; and so, if the Vicar have any Glebe, it is exempt, while occupied by him, from Rectorial Tithes (*a*).

6 Bac. Ab. 728. Lady Dartmouth v. Roberts, 16 East, 334.

(1180.)

6 Bac. Ab. 743.

(1209.) From the dissolution of Monasteries it has arisen not only that the lands of many laymen, (being derived from the Crown,) are discharged from Tithes; but that subsisting rights of Tithe, and the property of entire * Rectories are vested in lay hands. (1210.) (1199.)

* (1209. *n.*) A Rectory includes the Church itself; but when vested in a layman it does not empower him to convert the edifice to profane uses, or even to interfere with the Ecclesiastical regulation of the Seats. *Clifford* v. *Wicks*, 1 B. & A. 498. (40.) (1172.)

[(*a*) Provision is made, in cases where the lands are partially exempt, for commuting the tithe, with the consent of the land owners and tithe owners, for a fixed instead of a contingent rent-charge. See 6 & 7 W. 4, c. 71, s. 71; 2 & 3 V. c. 62, ss. 11, 12; 3 V. c. 15, s. 14.]

For in all the Acts of Hen. 8, by which the possessions of Religious Houses are given to the King, Parsonages * or Churches and Tithes are expressly included, and (at least in the Statutes of 27 & 31 H. 8,) the Royal Grants of
(1181.) them are confirmed. (1211.) And by St. 32 H. 8, c. 7, s. 2, the Ecclesiastical remedies for subtraction of Tithes are communicated to laymen; and by s. 7, the Title of laymen to Tithes is put on the same footing † with that to land, by giving them the same or similar Actions for vindicating their estates in those and other ecclesiastical profits against all persons "claim- "ing or pretending to have interest or title in "or to the same." (1212.) Hence not only may Fines be levied and Recoveries suffered
12 Co. 25. b. of Tithes (*a*), but the right to them may be asserted against an adverse claimant by Ejectment; though it seems that this remedy cannot
(1188.) be extended to the right to payments arising under a Modus. (1213.) (*b*) Hence also all such

* (1210. *n.*) If this provision had been omitted, the appropriations would have ceased upon the dissolution of the Corporations in which they were vested, and the Church would have recovered its rights. Com. Dig. Adv. D. 4.

(581 *n.* 855. 1086.) † (1211. *n.*) It has accordingly been held that a Covenant may run with Tithes as with Land. *Bally* v. *Wells*, 3 Wils. 25.

[66, *n.* 682, *n.*] [(*a*) Tithes are expressly included in the St. 3 & 4 W. 4, c. 74.]

(370, n.) [(*b*) St. 3 & 4 W. 4, c. 27, expressly extends to tithes, except tithes belonging to any spiritual or eleemosynary

Actions relating to Tithes are subject to the Statutes of Limitation; and therefore the actual enjoyment of this kind of hereditament for sixty years, together with the original Grant from the Crown, is in general a sufficient Title to it in fee-simple against all the world. 1 Prest. Abstr. 30. (417. 707.)

(1214.) It is to be observed that Tithes are so far of a distinct nature from other incorporeal hereditaments, that, wherever they are granted to a person capable of holding them, (as the King's subjects in general are of those included in the confiscating Statutes,) they will continue to subsist in his hands, although he be also owner of the land from which they arise (*a*), and will not pass from him by a mere conveyance of that land, or even of "all "* hereditaments and appurtenances thereto "belonging." (1205.) Phillips v. Jones, 3 B. & P. 362.

* (1214. *n.*) The word "hereditaments," however, is in itself very proper for including Tithes. See 2 Bing. 125.

corporation sole; nor does it extend to any modus or composition belonging to such a corporation. And see as to prescriptions of modus, exemption, or discharge, St. 2 & 3 W. 4, c. 100, above, 1189, n.]

[(*a*) The late Acts empower any person or persons seised in fee or in tail in possession, or having the power to dispose of the fee simple in possession, of any tithe or rent-charge in lieu of tithe, and also, where both the tithe or rent-charge and the land are settled to the same uses, any person in possession of an estate for life in both, by any deed or declaration under hand and seal, to be confirmed by the Commissioners under their seal, to merge the tithe or rent-charge in the inheritance of the land, (of what- [6 & 7 W. 4, c. 71, s. 71; 1 & 2 V. c. 64, ss. 1, 3, 4.]

6 Bac. Ab. 756. (1215.) Unity of possession therefore is no discharge of Tithe, unless it be immemorial and uninterrupted; and then it cannot be distinguished from Prescription, and consequently cannot be alleged by a layman whose lands did not formerly belong to a Religious House. (1121. 1143.) (1193. 1199.)

(1216.) But whether the retention of the Tithes by the owner of the land for sixty years, may not constitute a sufficient Title to them in his person against all other laymen, has been a question of much dispute; though it may now be considered as settled, that the mere retention or non-payment does not amount to an adverse possession upon which the Statutes of Limitation can operate; nor can a Grant be presumed without the aid of documentary evidence. (1213.) Berney v. Harvey, 17 V. J. 119. (395.) [See now, 1189, n.] (1187.)

6 Bac. Ab. 758; 4 Bac. Ab. 51, &c.; Wyburd v. Tuck, 1 B. & P. 458; Fell v. Wilson, 12 East, 83. (1217.) Tithes, like other incorporeal hereditaments, cannot in general be granted without Deed: but there have been various opinions concerning leases of them to the tenant of the land. So much seems now to have been ascer-

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[2 & 3 V. c. 62. s. 1.] ever tenure the land may be*.) But any incumbrance on the tithe or rent-charge previous to the merger, shall become an incumbrance on the land to the extent of the value of the tithe or rent-charge, and shall have priority of any incumbrance existing on the land at the time of the merger. [S. 2.] And it may be specially apportioned on the land or on part thereof, or on other lands held under the same title in the same parish.]

[2 & 3 V. c. 62, s. 6.] [* The tithes or rent-charge may in like manner be merged in the glebe or other land, where both belong to the same person in virtue of his benefice.]

tained, that a composition may be made with the Tenant by parol, which will have the effect of a Lease of the Tithes to him from year to year, and will require a similar Notice for its determination. (865.) (1218.) The yearly recompense in money, which is reserved or stipulated in a Lease of Tithes, is not regarded by the Common Law as a Rent, but as a mere personal duty. But by St. 5 G. 3, c. 17, Leases of Tithes made by Bishops, Colleges, &c. are placed on the same footing with their leases of Land under St. 32 H. 8, c. 28. Co. Litt. 47. a. (1052.) (237. 716.)

(1219.) The Tenth of all Ecclesiastical Revenue, which is given to the Crown by St. 26 Hen. 8, c. 3, s. 9, and with the First Fruits is now appropriated to the augmentation of poor livings under Queen Anne's Bounty, seems to be of the nature of a Rent; and therefore whatever part of it issued out of the Tithes, or other property of the Monasteries, must have been extinguished by unity of possession in consequence of their confiscation. (1220.) But "Tithes impropriate and Propriations of "Tithes" are expressly subjected by St. 43 Eliz. c. 2, s. 1, to the Rates for Relief of the Poor; and Parsons and Vicars, being also named in the same Act, are rateable in respect of their benefices, without exception of Tithes; which liability has been reasonably extended to a Rent created by an Act of Parliament as a substitute for Tithes which it extin- See 1 Bl. Comm. 284. [1 V. c. 20.] (1215.) (436.) 1 B. & C. 488. R. v. Boldero, 4 B. & C. 467. But see Mitchell v. Fordham, 6 B. & C. 274.

(1130.) guished. Tithes are also included in the Land Tax Acts (*a*).

(1221.) It seems to be no where precisely
(874.) laid down that Tithes impropriate can be taken
Co.Litt. 159. a. under an *Elegit* (*b*). They are however As-
(734.) sets in the hands of the heir when they descend in fee simple: and are said to have all the other incidents * of temporal inheritances (*b*).

Sect. 5.—*Of Advowsons.*

(1222.) An Advowson is the Patronage of a Church, or the authority of determining, under certain restraints, who shall be its clerical incumbent. It is not therefore, like most other

* (1221. *n.*) But as they cannot have been in lay hands before the Dissolution of Monasteries, they are never subject to any Custom which relates solely to the property of individuals in their natural capacity, such as the rule of Descent in Gavelkind. 2 N. R. 508. It seems however that they may be parcel of a Manor. See Harg. Co. Litt. 58. b. n. 9.

[(*a*) The rent-charge is subject to all parliamentary, parochial, county, and other rates, charges, and assessments, in like manner as the tithes were. (St. 6 & 7 W. 4, c. 71, s. 69.)]

[1 & 2 V. c. 110, ss. 11, 13.] [(*b*) Tithes are, under the late Act, extendible on an elegit or chargeable in Equity. (See above, 873, n.*, †.) And so, therefore, is the rent-charge for which they are commuted; for it is subject to the same liabilities and incidents as the tithes were. See St. 6 & 7 W. 4, c. 71, s. 71; above, 1186, n.]

incorporeal hereditaments, a modification of (4.)
Right to Land or any of its profits, but rather a modification of Power. (1223.) All Advowsons seem to have originally belonged to the founders of Churches, as recompenses for their endowment; and most of these founders being Lords of Manors, there has generally been an immemorial annexation of the Advowson to the Manor, so that by any conveyance of the latter the former passed as *appendant* to it, unless expressly excepted. At this day however Advowsons frequently occur as separate subjects of property; which are said to be *in gross*, in contradistinction to those which are appendant. (1224.) When Rectories were appropriated by Ecclesiastical corporations, and Vicarages endowed as before mentioned, the Advowson of the Vicarage became of course appendant to the Rectory, though capable of being severed from it. The distinction therefore between Advowsons Appendant, and Advowsons in Gross, is applicable to the patronage of Vicarages as well as Rectories.

Co. Litt. 119. b.

Co. Litt. 307. a.

(1206.)

Sherley v. Underhill, Mo. 894; Anon. Dyer, 350. b.

(1225.) But there is yet another kind of Patronage, though not properly called an Advowson, which consists in the power of appointing a Perpetual Curate. Such Curacies are of two kinds: the first arises from the erection of a Chapel of Ease; of which, by the Common Law, the Minister is to be nominated by the Incumbent of the Mother Church; unless this power has been vested in others by

Arthington v. Bp. of Chester, 1 H. Bl. 418.

Farnworth v. Bp. of Chester, 4 B. & C. 555; Faulkner v. Elger, 4 B. & C. 449.

the consent of Patron, Parson, and Ordinary, or by immemorial Custom, which supposes such consent. (1226.) The second kind is to be found in those appropriated Rectories, where the election or appointment of the officiating minister is regulated by a like Custom; and in some also which by other means have escaped the operation of the St. 4 Hen. 4, c. 12, and falling into lay hands after the dissolution of Monasteries, had no other provision for the service of the Church. In this last case it seems that the Patronage is inseparably incident to the Rectory. (1227.) Such Curates, having received their appointment, enter upon their offices without further ceremony than the *license* of the Bishop.

Burn's Eccl. Law, Curates.

3 Tau. 463; 1 H. Bl. 425 431.

(1228.) There are also donative Advowsons under which the Incumbent is constituted by the sole Grant of the Patron, without any further ceremony whatever. (1229.) But in general an Advowson may be said to consist of the right of nominating and presenting to the* Bishop, upon a † vacancy of the Church, a fit ‡

Burn's Eccl. Law, Donative. Co. Litt. 344. a.

* (1229. *n.*) If the Bishop be himself the Patron, the nomination and institution are united in one act, which is called Collation.

† (1230.) If however the Iucumbent be made a Bishop, the right of presentation upon the vacancy thus occasioned devolves to the King. 2 Bl. Rep. 773.

‡ (1231.) As to the fitness of the person, see 1 Bl. Comm. 389. By St. 13 & 14 Car. 2, c. 4, s. 14, he must have previously been made a Priest by Episcopal Ordina-

person to be by him instituted Rector or Vicar. (1232.) In some cases it seems that the right of *nomination* is in one person, and the right of *presentation* in another: but the former constitutes the substance of the Advowson. (1233.) If the Patron fail to make his presentation within six calendar months after the vacancy happens, the Bishop becomes entitled to collate a person of his own choice; upon his neglect for a like period, the right lapses to the Archbishop, and from him to the King. (1234.) The Presentation is no more than a letter, or it may be a communication by Parol, to the Bishop. (1235.) The Institution is an act of more solemnity, which is evidenced by an instrument under the Bishop's Seal, (though that perhaps is not essential,) and by registration in his Court. (1236.) And this is followed up by a mandate to the Archdeacon to perform the ceremony of Induction, which is a kind of investiture or livery of seisin of the Church property. This is necessary to give the Incumbent a complete *estate* in his benefice; without it he can make no Grant, nor sue in any Court for his tithes; but by Institution the vacancy of the Church is at an end, and the *right* of the Incumbent completed, unless

Sherley *v.* Underhill, Mo. 894.

Dyer, 327 b. *marg.*; 2 Inst. 361.

Co. Litt. 120. a. 344. a.

Cro. Car. 342

Burn's E. L. Benefice.

Com. Dig. Esglise, L. M.

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tion; in order to which, by the Canons of the Church, enforced by St. 44 G. 3, c. 43, he must have attained the complete age of twenty-four years, unless a Faculty for earlier Ordination be granted by the Archbishop of Canterbury or of Armagh.

where the Royal Prerogative interferes. (1237.) The Patron's remedy against the Bishop, if he refuse to admit his Presentee, is by Writ of Quare Impedit (*a*).

2 Inst. 356. There are three kinds of Action by which the right of Presentation may be indicated, *viz.* Writ of Right of Advowson, Assize of Darrein Presentment, and Quare Impedit (*b*). The last of these is available only upon an actual vacancy of the Church, and resistance made to a presentation: and the Old Law, though it might be brought by a purchaser of the Advowson who had never before had an opportunity of presenting, yet it could not be brought by any person having only the right in fee simple to an Advowson, which had been divested from him by the *Usurpation*, or effectual presentation, of a stranger. (1238.) In such a Case therefore it was necessary first to recover the Advowson itself; which a purchaser, who had never presented, had no means of doing; but any person who had once actually presented might proceed by Assize, while the heir of such a person was driven to his Writ of

[See Doe *v.* Fletcher, 8 B. & C. 25; and Tyrrell *v* Jenner, 5 Bing. 283.]

[(*a*) Where the clerk has been rightfully instituted and
[1252.] inducted, he may maintain ejectment against one whose institution and induction were void under St. 13 Eliz. c. 6. *Doe* v. *Fletcher*, 8 B. & C. 25.]

[(*b*) The two former are abolished by St. 3 & 4 W. 4, c. 27, s. 36; and the time within which a *quare impedit* can now be brought, is limited by ss. 30—33. See above, 375, n. & *.]

Right. But since it has been enacted by St. 7 Ann. c. 18, that no Usurpation shall displace [Gully v. Bp. the estate or interest of any person entitled to of Exeter, 10 B. & C. 605.] an Advowson, these two forms of Action have become useless, and the Title is now always tried by Quare Impedit. (1239.) By St. 1 Mar. Sess. 2, c. 5, it is declared that the Statute of Limitation of 32 H. 8, c. 2, does not relate to (375, &c.) Actions concerning Advowsons; nor is there any other Act which limits the time within which such Actions must be brought (a). (1240.) It follows that the commencement of the Title to an Advowson cannot be fixed at sixty years (a): (417, 418.) and that the fact of ancient possession never constitutes a right; though it may afford a strong presumption of it. This presumption indeed is as forcible in the case of an Advowson as it can be in that of any other kind of property; for it rests upon unquestionable evidence of the actual exercise of at least a pretended right, since the entries of Institutions in the Bishop's Register are always accompanied with (1235.) the names of the patrons who presented; and it is aided by the consideration that the Institution, being a sort of Judicial act, would not 2 Inst. 357. have been made without due inquiry.

(1241.) Where the title to an Advowson is by Descent, it must be derived from the person Co. Litt. 15. b.;

[(a) But see now, St. 3 & 4 W. 4, c. 27, ss. 30—33, above, 375, n. & *.]

(302.) (1223.) who last presented (*a*); or, if it be an Advowson Appendant, who was last seized of the
Co. Litt. 32 a. (349.) Manor (*a*). (1242.) The wife of a tenant in fee simple, or in tail, is entitled to Dower; but her third part consists in a right only to the third presentation after her husband's death, which
(316.) shall happen in her lifetime. (1243.) When
Co. Litt. 166. b. and see Harg. n. 2. an Advowson descends to Coparceners, the eldest sister is entitled to present alone upon
[Gully *v.* Bp. of Exeter, 10 B. & C. 584.] the first vacancy; and it is evident that the only mode in which a Partition of such a hereditament can be effected between them is to
Co. Litt. 164. b; St. 7 Ann. c. 18. assign to each her turn of presentation, which thenceforward constitutes in her a separate inheritance. (1244.) Joint-tenants, and Tenants in Common before partition, ought to join in presentation; but the Bishop may ac-
7 Bac. Ab. 475. cept the presentation of any of them as made on behalf of the rest.

(1245.) The alienation of an Advowson may be effected by deed, (*b*) Fine or Recovery. It is said that the Recovery, if it be of an Ad-
Pig. Rec. 97; 5 Co. 40. b.; 2 Wils. 116. vowson in Gross, ought to be grounded on a Writ of Right of Advowson; but if such an
(1237.) (615. 685.) Advowson be included with land in a Writ

[(*a*) The descent must be traced from the purchaser,
[301, *n*.] according to the new canon of descents in s. 2 of St. 3 & 4 W. 4, c. 106; for the Act expressly extends to advowsons. See s. 1.]

[(*b*) And now, by the substituted mode of assurance;
[66, n.] for advowsons are expressly within the St. 3 & 4 W. 4, c. 74. See s. 1.]

of Entry, the Recovery cannot be impeached.
(1246.) Advowsons are capable of being en-
tailed (*a*), as being comprehended under the (3. 646.)
word Tenement in its widest sense. And an Co. Litt. 85. a. Co. Tr. 97.
Advowson Appendant may even be held by (1000.)
feudal service; though it seems to be other-
wise of an Advowson in Gross. (1247.) It is
peculiar to Advowsons that a kind of chattel
interest in them may be created, which does
not consist of any Term or Period of enjoy-
ment, but of a single future fruit or benefit:
for such is the effect of a Grant of the * next or
any subsequent Presentation; and indeed if any
number of future Presentations be granted, the Co. Litt. 249. a. 378. b.
case is similar. (1248.) If however the owner Hall *v.* Bp. of
of the Advowson be also Incumbent of the Winton, 3 Lev. 47; and see
Church, the right of presentation accruing on Rennell *v.* Bp. of Lincoln,
his death does not devolve as a chattel upon 3 Bing. 223. S. C. reversed,
his Executor, but descends to his heir (*b*). B. R. 7 B. & C. 113; [and (1230.)]

* (1247. *n.*) Whether the Grantee of the *next* presentation may suffer from the incumbent's promotion to a Bishoprick, see 2 Bl. Rep. 774.

[(*a*) A person claiming to present by virtue of an estate or right, which a tenant in tail of the advowson might have barred, shall be deemed a person claiming through such tenant in tail, for the purposes of the late Limitations Act. (s. 32.)] [3 & 4 W. 4, c. 27.]

[(*b*) For the descent of the advowson to the heir is preferred to the fall of the avoidance to the executor, both occurring at the same moment. (8 Bing. 520.) The case of *Mirehouse* v. *Rennell*, decides, that the right of presentation, where the church is void at the death of the patron, belongs to his personal representatives, as well in the case of a corporation sole as of a private individual.]

reversal affirmed, in D. P. nom. Mirehouse v. Rennell, 8 Bing. 490.]
Harg. Co. Litt. 17. b. n. 3; Co. Litt. 374. b. (734. 874.) 2 Bac. Ab. 713.

(1249.) The Law considers an Advowson in the double light of temporal property and spiritual trust. In the former view, it justifies the sale of it in fee simple, and declares it to be Assets in the hands of an heir; though, as it does not produce any annual profit, it seems not to be extendible on an Elegit (*a*). (1250.) On the other hand, whenever the Church has become vacant, a public and religious duty attaches so firmly upon the immediate right of presentation as to render it unalienable; and therefore by the old law, when an Advowson descended on an infant heir, and a vacancy occurred, his Guardian in Socage, to whose care all his property was committed, was not entitled to present, but the infant must act for himself; and by the late Bankrupt Act, (St. 6 G. 4, c. 16, s. 77,) when other Powers exerciseable by the Bankrupt for his own benefit are transferred to the Assignees, this is excepted. (1251.) But before the Church has become vacant, a Grant may in general, as we have seen, be made of the next Presentation; and the interest thus created is evidently of an intermediate nature between the mere trust and the absolute property. The validity of the Grant is therefore to be determined by circumstances, and particularly by the Consideration

Co. Litt. 17. b. 69. a. (1012. 200.)

(246.)

(1247.)

[1 & 2 Vict. c. 110.] [873, n. (*a*), *, †.]

[(*a*) But it is expressly made chargeable in Equity under s. 13 of the late Act, though not, it would seem, extendible under s. 11.]

upon which it is made; and this consideration must be estimated by rules peculiar to the subject matter.

(1252.) These rules owe their present strictness principally to the Statute of 31 El. c. 6, which in s. 5,* enacts, "That if any person "shall for any sum of money, reward, gift, "profit, or benefit, directly or indirectly, or for "or by reason of any promise, agreement, "Grant, Bond, Covenant, or other Assurances, "of or for any sum of money, &c. present or "collate any person to any Benefice with Cure "of Souls, Dignity, Prebend, or Living Eccle-"siastical, or give or bestow the same" for such corrupt consideration, then such presentation, &c. shall be utterly void, and the King may present for that term. A pecuniary penalty is also imposed on the parties, and the presentee is for ever disqualified from holding that benefice. And by s. 8, a penalty is likewise imposed for the carrupt resignation of a benefice. (1253.) In the construction of this Statute it 6 Bac. Ab. 188.
has been held, that if the next Presentation can be shewn to have been purchased with the intention of presenting a certain person, who upon the vacancy taking place is presented accordingly, this fact is sufficient to render the transaction corrupt and simoniacal. And though an exception has been made in the case of a Father providing for his son, the principle of that ex- 2 B. & C. 652.
ception has since been denied. (1254.) And by St. 12 Ann. c. 12, all persons are prevented

from providing for *themselves* by the purchase of any next presentation. (1255.) The circumstance of the Incumbent being at the point of death, when the contract of purchase is made, may also vitiate the transaction; nor is a Grant of the Advowson for a Term of years, which may possibly extend to several vacancies, distinguishable from a Grant of the next Presentation merely (*a*). (1256.) These severe decisions are not, however, generally applicable to cases where the next presentation is purchased inclusively in the fee simple of the Advowson; a distinction which would be more reasonable, if the growing fruit were not the most valuable part of the tree. And it may be doubted whether the Stature of 12 Anne, (which speaks only of next Presentation,) can be so far extended as to render simoniacal the purchase of an entire Advowson by a person who afterwards presents himself upon the first vacancy. (1257.) With respect to Presentations accompanied with an agreement for resignation, a distinction was long supposed to exist between general and circumstantial stipulations. But it has lately been decided by the House of Lords that all such engagements are void. This, however, being a

Fox v. Bp. of Chester, 2 B. & C. 635 (*a*).

Barret v. Glubb, 2 Bl. Rep. 1052.

Fletcher v. Ld. Sondes, 3 Bing. 501.

[(*a*) The case of *Fox* v. *Bishop of Chester* was reversed in the House of Lords, and the sale of the next presentation under the circumstances was supported, the Clerk who was afterwards presented, not being implicated in the transaction. See 6 Bing. 1.]

somewhat unexpected decision, has given rise to the St. 7 & 8 G. 4, c. 25, by which engagements, made before the 9th April, 1827, for the resignation of any benefice, when a person, or one of two persons named, should become qualified to accept it, are confirmed; but with a Proviso that the resignation itself shall be void unless that person, or one of those two persons, be presented within six calendar months (*a*).

[(*a*) St. 9 G. 4, c. 94, makes effectual any engagements thereafter made in express terms for the resignation of any benefice in favour of any one person named and described, or of one of two persons named and described, each of such two persons being uncle, son, grandson, brother, nephew, or grand nephew, of the patron, or of the person for whom the patron is trustee, or of the person by whose direction, or in whose right, the presentation is to be made; provided that such engagement be entered into before the presentation of the party entering into it; and that one part of the deed or writing, whereby the engagement is made, be deposited within two calendar months after the date thereof, with the registrar of the diocese or peculiar jurisdiction; an office copy of which shall be evidence.

The resignation must refer to the engagement, and state the name of the person for whose benefit it is made. And it will be void unless he be presented within six calendar months after notice of resignation to the patron.

The Act does not extend to any case where the presentation shall be made by any corporation aggregate or sole, or any person in right of any office, or any trustee for any charity, or other person not entitled to the patronage as private property.]

CHAP. VII.

OF CUSTOMARY ESTATES.

(1258.) By Customary estates we mean those to which the Title is not only modified, but altogether constituted by * Custom. Such are to be found in many Manors; and though the Custom of these Manors are almost infinitely diversified, they have yet all some common features, which the law recognises as forming
9 Co. 75. b. a uniform sytem, and may be said to have adopted into its own body. (1259.) The † Lands to which these Customs relate are called Customary Lands; but, subject to the Estates in
Co. Tr. 11; 5 Mod. 382. them which the Custom confers, they are held also by the Lord under the Common Law as part of the Demesnes of his Manor. (1260.)
(1023.) For these Customary Estates were in their

(1133.1152.) * (1258. *n.*) An Allotment made under an Inclosure Act to the owner of a Customary Estate in respect of his Right of Common Appendant, will not be of Customary
[Doe *v.* Hellard, 9 B. & C. 789.] Tenure, unless so provided in the Act. *Doe* v. *Davidson*, 2 M. & S. 175.

† (1259. *n.*) A Customary estate may subsist in Under-
(1162. woods without the soil, and in the herbage or vesture of land, (*Stammers* v. *Dixon*, 7 East, 200,) and also in some decidedly incorporeal Tenements; but it is absolutely necessary that the subject should have existed, as parcel of a Manor, from time immemorial. See Co. Litt. 58. b.; Co. Tr. 97; 1 Bac. Abr. 720.

origin mere Tenancies at Will, though by long indulgence they have in many instances acquired the character of a permanent inheritance; and as Tenancies at Will they continue to be considered, in all questions relating to Co. Tr. 5.
the Legal, as distinguished from the Customary, property in the land.

(1261.) The great criterion of a Customary Litt. 74, 75.
Estate is, that all alienations of it must be transacted, in part at least, in the Lord's Court. Hence the proper evidence of Title to such See Doe v. Calloway, 6 B. & C. 484.
Estates are Copies of the Court Rolls; from which the Tenants of them are in general denominated *Copyholders.* (1262.) The Court [Doe v. Mee, 4 B. & Ad. 617.]
of which we here speak must not be confounded with the Court Baron, properly so called; for (1027.) Co. Litt. 58. a. 4 T. R. 446.
though it commonly happens that they are held at the same time, and the same Roll serves to record the proceedings of both, the two Courts are of a nature essentially distinct. To the Court Baron the Freeholders of the Manor are Suitors, as Judges; to the Customary Court the Copyholders are Suitors, not as Judges, but as assistants to the Lord, or his Steward, one or other of whom alone exercises the judicial authority. And though there should hap- Co. Tr. 53.
pen a failure of Suitors to the Court Baron, (1024.1042.)
and consequently in strictness of law, an extinction of the Manor; yet, for all purposes to which the Customary Court is applicable, the original jurisdiction will continue.

(1263.) The ordinary mode of Alienation of

a Copyhold Estate in fee simple is by Surrender and Admittance: of which the simplest form is as follows. The Copyholder appears personally in Court, and, by whatever ceremony the Custom of the Manor may have prescribed, professes to surrender or deliver up his Land to the Lord, (whether in his own person, or, which is more usual, as represented by his Steward,) expressing the Surrender to be to the use of *A.* and his heirs; and thereupon *A.* is with due ceremony *admitted* Tenant of the land, to hold it to him and his heirs *at the will*
(1260.) *of the Lord, according to the custom of the*
Litt. 84. *Manor.* He then pays a Fine to the Lord;
(1002.1055.) and also (if required) does Fealty. All these circumstances, or at least the Surrender and
(1261.) Admittance, are entered on the Court Roll; and the new Tenant, paying his Fees to the Steward, receives a copy of this fundamental document of his Title.

(1264.) The first variation which we may remark in this form of proceeding, is where the Surrender is made at one Court, and the Admittance postponed to another. Here, in
Co. Tr. 87. the interval, the estate, instead of passing to the Lord, (as the name given to the first ceremony might be thought to imply,) continues vested in the Surrenderor; but the Surrender,
(223.) at least if it was made upon good Consideration, (*viz.* of money, or money's worth, or future marriage,) is irrevocable, and a second Surrender to the use of another person would be

void. (1265.) A Surrender may however be made upon condition; which is the usual mode of mortgaging Copyholds; and if the money be paid at the stipulated time, the Surrender, not having been perfected by Admittance, becomes void without further ceremony; or supposing the Mortgagee to have been admitted, and to have taken possession, the Mortgagor may yet resume his Estate by making an entry upon the land. (1266.) But as upon Admittance a Fine becomes due to the Lord, it is not usual for a mere Mortgagee to be admitted to the Copyhold, until some suspicion arises that his loan will not otherwise be repaid; and hence it often happens that a Conditional Surrender, though not vacated by a punctual performance of the Condition, yet becomes redeemed upon equitable principles by a later payment, while the transfer of the Copyhold Estate is still uncompleted. In such cases it is usual for the Steward, being duly authorized by the Mortgagee to make an Entry upon the Roll that the debt is satisfied; and thenceforward the Conditional Surrender is as much disregarded as if the Condition had been exactly fulfilled. (1267.) The principle upon which this practice has proceeded seems to be, that a merely voluntary Surrender* may at

Cro. Car. 274.

Simonds v. Lawnd; Cro. El. 239; Co. Tr. 128.

Coote Morg. 113.

(1264.)

* (1268.) See 1 Watk. Cop. 87, where the authorities for this position are given; which, however, with the exception perhaps of a dictum by Kitchen, are not quite satis-

any time be revoked, and when a Surrender was made in consideration of a loan which has been repaid, it is reasonable to consider it as of no more force since the repayment than if it were originally voluntary. (1271.) Sometimes indeed the practice is carried further, a new Surrender being made before the debt secured by the old one has been discharged. And it seems clear that such a new Surrender, if it do

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factory. The reasoning by which such a doctrine is to be supported, may be thus stated: the Surrender of itself confers no estate; if therefore it bind the land, it must bind it as a contract; but a merely voluntary contract is never enforced either in Law or in Equity; and it would be absurd that what has no validity in itself should deprive other acts of their efficacy. To which it may be objected that the Surrender is not properly a contract for future performance, as it leaves nothing further to be done by the Surrenderor; but is rather the principal and leading part of the Assurance, and may be compared to a Bargain and Sale which is not yet enrolled. For it is to be observed that the Admittance may take place even after the death of the Surrenderor: and that whenever it is made, all things are thenceforward placed on the same footing as if the admittance had immediately followed the Surrender; (*Benson* v. *Scott*, 3 Lev. 385; *Vaughan* v. *Atkins*, 5 Burr. 2764; *Doe* v. *Hall*, 16 East, 208;) (1269.) except indeed that no validity is [See 1294 & n.] given to any attempt at alienation made by the new Tenant before his Admittance. *Doe* v. *Tofield*, 11 East, 246.

(1270.) The question has here been considered independently of the St. 27 Eliz. c. 4, (against Fraudulent (224.) Conveyances,) the applicability of which to Copyholds is doubtful. *Doe* v. *Routledge*, Cowp. 706. [But see 225, n.]

not acquire force in consequence of the first being invalidated, (at least in the view of Equity,) by a subsequent payment, yet at all events, if perfected by Admittance, may, without any violation of the principles of Customary Tenure, be improved into an indefeasible estate by a *Release* from the Mortgagee; to which a written Warrant to the Steward to acknowledge satisfaction on the Roll may perhaps be thought to be, for this purpose, equivalent. See Doe v. Wroot, 5 East, 132. Co. Tr. 83; Kite & Queinton's Case, 4 Co. 25; 10 East, 595. (1266.)

(1272.) Surrenders may also be made to the Lord in person out of Court; and so, it seems, to the Steward. And by special custom they may be made out of Court to the Lord's Bailiff, to two or three of the Copyholders, or the like. But such Surrenders, if not duly *presented* in Court, and, it is said, at the *next* Court, will be void. (1273.) It has been held also that, until *Presentment, they are always capable of revocation. But if the Surrenderor die before the Presentment, it may still be made at the next Court. (1274.) When a Surrender is made in Court, or to the Lord, or perhaps to Co. Litt. 59. a. & Harg. n. 6. Co. Litt. 62. a. See 6 B. & C. 493. Burgaine v. Spurling, Cro. Car. 273. 283. (1268.) 4 Co. 29. b.; 1 Watk. Cop. 67.

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* (1273. *n.*) The same objection might be made, though perhaps not with the same force, to this decision, as to the doctrine that all voluntary Surrenders, though made in Court, or presented, may be revoked before Admittance. And therefore, though the opinion of the Judges in *Burgaine* v. *Spurling*, appears adverse to that doctrine, their decision has been regarded as an authority in its favour. (1268.)

(1272.) his Steward, out of Court, it is not necessary that the Surrenderor should appear in person, if he appoint another person by Deed to act as his Attorney; but Surrenders which are authorized only by the peculiar Custom of the Manor cannot be made by Attorney, unless there be a Custom for that also. (1275.) A Surrender may be made by * Husband and Wife of the Wife's Land, she being first examined as to her consent by the Steward, without any special Custom; but a Custom for the Wife to surrender alone cannot be supported (*a*).

9 Co. 76.

1 H. Bl. 344; Driver *v.* Thompson, 4 Tau. 294; Stevens *v.* Tyrell, 2 Wils. 1.

(1276.) The *Uses* expressed in the Surrender entirely govern the operation of the subsequent Admittance. If any other person than he to whose use the Surrender was made, (and who may without much impropriety be called the

Co. Litt. 59.b; Zouch *v.* Forse, 7 East, 186; Westwick *v.* Wyer, 4 Co. 28; Co. Tr. 92; Doe *v.* Brightwen, 10 East, 583.

* (1275. *n.*) If the wife be out of possession, such a Surrender may operate as a release of her right; though a *Deed* of Release from her can have no effect. *Stone* v. *Eaton*, 2 Show. 82.

[(*a*) S. 77 of St. 3 & 4 W. 4, c. 74, (above, 66, 2 n. *a*,) which embraces, generally, land of any tenure, contains a proviso that the Act shall not extend to copyholds of or to which a married woman, or she and her husband in her right may be seised or entitled for an estate at law, in any case in which any of the objects of that section could, before the Act, be effected by her, in concurrence with her husband, by surrender. And, by s. 90, where the estate is equitable, the wife shall be separately examined, as if the estate were legal; and the surrender shall then bind her and all claiming under her.]

Surrenderee,) be admitted by the Lord, he acquires no Title: and if, on the Admittance of the Surrenderee, other words of limitation are used than those in the Surrender, they are of no avail, and the estate expressed in the Surrender takes effect, notwithstanding the variation thus introduced by the Lord or his Steward. (1277.) For in the transfer of a Copyhold Estate these persons are considered as mere instruments; and therefore neither the Title of the Lord to the Manor, nor the regularity of the Steward's * appointment, requires to be ascertained. Co.Tr.91.105. Harg. Co. Litt. 58. a. n. 5.

(1278.) The words of limitation in the Surrender must be the same as those which would be required for a like purpose in the conveyance of Freehold Lands, unless the peculiar Custom authorize a variation. And in other respects the Surrender is generally to be construed in the same manner as a conveyance at Common Law. But words of qualification, with respect to Joint-tenancy or Tenancy in Common, will be interpreted as in the declaration Co.Litt.59.b.; 3 T. R. 473.; 4 Co. 29. b. (165.) Fisher v. Wigg, 1 P. Wms. 14.

* (1277. n.) The Steward may be constituted by Parol, and then (at least if no period be stipulated,) the Lord may discharge him at pleasure. 4 Co. 30. But a Grant of the office for life must, it seems, be made by Deed; and such a Grant is irrevocable; though a forfeiture may be incurred by misconduct or neglect. Sugd. Vend. 230. *Bartlett* v. *Downes*, 3 B. & C. 616. Where there are joint Stewards, it seems that one may act without the other. 1 Scriv. Cop. 130.

of uses in such a conveyance. (1279.) In some respects also the interposition of a third person here, as under the Statute of Uses, gives a latitude otherwise unknown to the Common Law.
4 Co. 20. b. (211.) Thus a Copyholder may surrender to the use of his wife, or to his own use. (1280.) Whether
Boddington v. Abernethy, 5 B. & C. 776. [R. v. Oundle, 1 A. & E. 283.] he can create Springing or Shifting Uses, is a question which after much controversy appears now to be finally decided in the affirmative.

Goodtitle v. Morse, 3 T.R. 365. (83.) Fearne, C. R. 319. (1281.) A Surrender cannot operate by Estoppel upon a future Estate; nor can it destroy Contingent Remainders. These indeed, though they may fail in the event, from the defect of their original limitation, for want of a sufficient estate to support them, cannot be destroyed by any act of the Tenant for life; and therefore it is unnecessary in ordinary Settle-
(776.) ments of Copyhold Property to insert Trustees for their preservation.

(1282.) The words in the Habendum of the
Litt. 73. Admittance, "at the will of the Lord," (though
(1263.) they have now entirely lost their original sense,) are characteristic of those Customary Estates to
(1261.) which ordinary usage, in opposition to etymology, seems to have exclusively appropriated the name of Copyholds. (1283.) There are
Harg. Co. Litt. 59. b. n. 1. other Customary Estates which in the Admittances are expressed to be held, "according to "the Custom of the Manor," but without inserting the words "at the Will of the Lord."
Doe v. Huntington, 4 East, 271. These, though of the same general nature with Copyholds, are commonly denominated Cus-

tomary Freeholds; but whatever privileges may be annexed to them, the true Freehold interest in the land is always vested in the Lord; and though in some instances a Deed of Bargain and Sale is employed instead of a Surrender for transferring the Customary Estate, yet as the Assurance is imperfect without an Admittance in the Lord's Court, the Tenure is properly said to be by Copy of Court Roll; and by that name only is it excepted in the St. 12 (1007.) Car. 2, c. 24, s. 7, when other Tenures are converted into Free and Common Socage.

(1284.) The Statute de Donis is held not to Co. Tr. 123. extend to Copyholds; and therefore if an estate (641.) be limited to *A.* and the heirs of his body, this is not necessarily an estate tail. In the absence Doe *v.* Clark, 5 B & A. 458. of a special Custom to that effect, the Estate will be of that kind which is called a Fee Simple Conditional at the Common Law, and which was universally created by those words of limitation before the Statute de Donis. But in many Manors a Custom of entailing Copy- Co. Tr. 112; Co. Litt. 60 b. holds has prevailed; which however cannot be supposed to have arisen in consequence of that Statute, without at the same time denying the antiquity which is essential to its existence: though it may be easily understood that some original peculiarities in the nature of the Conditional Fee Simple to which the Copyholds of particular Manors were subject, have received an interpretation analogous to that which the King's Courts put upon the Statute de Donis;

and that thus Estates Tail in those Copyholds have been discovered, though not invented, within the time of memory*. (1285.) (*a*) These

* (1284. *n*.) A Custom to create Entails may be said to exist, wherever instances have occurred not merely of the limitation of estates to heirs of the body, but of the alienation of the ancestor being defeated by the issue, or of a remainder being enjoyed upon the failure of issue. Co. Litt. 60. b.

[(*a*) S. 50 of St. 3 & 4 W. 4, c. 74, enacts, that all the previous clauses of the Act, (the most material of which are noticed above, 66, 1 n. *a*, 682, n., 691, n.) shall, so far as circumstances admit, apply to copyholds, except that the disposition by a *legal* tenant in tail must be by surrender, and the disposition by an *equitable* tenant in tail must be by surrender or by a deed as after provided; and except as such clauses are otherwise after altered. It is then enacted, s. 51, that where the protector consents by deed, the deed must, at or before the surrender, be executed and produced to the lord or his steward or the deputy-steward, who shall indorse thereon an acknowledgment under his hand that it was produced within the time limited, and shall cause the deed and indorsement to be entered on the court-rolls, and shall then indorse on the deed a memorandum signed by him testifying such entry. By s. 52, if the consent be not given by deed, it must be given by the protector to the person taking the surrender; and if the surrender be made out of Court, the memorandum thereof must state such consent, and must be signed by the protector; and the memorandum, with such statement thereon, must be entered on the court-rolls; but if the surrender be made in Court, the entry thereof, containing a statement of such consent, must be made on the court-rolls. By s. 53, an equitable tenant in tail is empowered to dispose by deed of the copyholds, as if they had been freehold; and the deed must be entered on the court-rolls,

Estates Tail are not capable of being discontinued; nor can any assurance be made of them similar to a Fine; but in all cases they may be enlarged into Fee Simple, either by some appropriated proceeding in the Lord's Court, (which is most commonly analogous to a Common † Recovery, and called by that name,) or, in the absence of a Custom for that purpose, by a mere Surrender. And in some Manors the Custom has given equal validity to both these modes of Assurance. (671, 698, 1281.) Roe v. Jeffery, 2 M. & S. 92; Doe v. Dauncey, 7 Tau. 674.

(1286.) It is a general rule, that no Statute relating to Lands or Tenements, in which those of a Customary tenure are not expressly men- Co. Tr. 122. [5 B. & Ad. 137.]

† (1285. *n.*) Wherever the Custom authorizes such Recoveries they may now, by St. 47 G. 3, Sess. 2, c. 8, be suffered by Attorney, though the practice may have been to suffer them in person only. (1274.)

and if the protector consents by a distinct deed, such deed must be executed on or before the day on which the deed of disposition is executed, and must be entered on the court-rolls; and it is made imperative on the lord or his steward or deputy-steward, to enter the same when required, and he must indorse on such deed a memorandum signed by him, testifying such entry. And it is provided that every such deed of disposition by an equitable tenant in tail, shall be void against a subsequent assurance for valuable consideration, unless entered on the court-rolls before the entry of such subsequent assurance. And s. 54 provides that, as to copyholds, no surrender or memorandum or copy thereof or deed of disposition or deed of consent of the protector, shall require inrolment otherwise than by entry on the court-rolls.]

tioned, shall be applied to Customary Estates, if such application would be derogatory to the Customary Rights of the Lord or Tenant. Hence the St. of Westm. 2, (13 Edw. 1,) c. 18,
Co. Tr. 123; Harrington v. Smith, 2 Sid. 41. 73; 4 Mod. 85. which introduces the Elegit (*a*), and the St. 11 Hen. 7, c. 20, which makes alienation by a Jointress, otherwise than for the term of her
(873. 708.) own life, a forfeiture of her estate (*b*), have been held not to extend to copyholds; as each of these Statutes would cause an estate to vest in a new owner without the accustomed ceremo-
(128, &c.) nies. So the Statutes of Uses, and the Sta-
Co. Tr. 124. tutes of 31 H. 8, c. 1, and 32 H. 8, c. 32, re-
[318, *n*.] lating to Partitions, and that of 32 H. 8, c. 28,
(716.) giving power to make Leases, are inapplicable.
(235.) And in the Registry Acts, Copyholds are excepted.

(255.) (1287.) The Statutes of Wills have no con
Tuffnell v. Page, 2 Atk. 37; Doe v. Danvers, 7 East, 299. nexion with Copyholds: and though that part of the Statute of Frauds which relates to the signature of Wills, (St. 29 Car. 2, c. 3, s. 5,)
(260.) mention lands "deviseable by any particular
[1288, n. *a*.] "custom," still it does not include Copyhold
Pike v. White, 3 Bro. C. C. 286. Estates; which are in fact deviseable by a general Custom extending to them all; unless in

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[873, n. *, †.] [(*a*) But now, under the late Act, St. 1 & 2 V. c. 110, Copyholds may be extended on an elegit, under s. 11, or charged in equity, under s. 13; but subject to all payments and services to the lord or other person, to which the copyholder was liable. s. 11.]

[(*b*) See now St. 3 & 4 W. 4, c. 74, ss. 16, 17, above, 708, n.]

some Manors where a particular Custom to the contrary, (which however seems to be confined to the so called Customary Freeholds, or to Customary Estates of a peculiar nature, and perhaps only existing in the Northern Counties,) may be found to prevail. (1288.) Another reason which formerly existed for not including Copyholds in this provision was, that they could not be devised unless the Testator had previously *surrendered them to the use of his Will*, and they were considered to pass rather by that Surrender than by the Will itself; but this ceremony is now dispensed with, and yet Copyholds continue to be disposed of by Will without the formalities prescribed by the Statute of Frauds. For by St. 55 G. 3, c. 192, every disposition of Copyhold Tenements made by the last Will of a person who should die after the 12th day of July 1815 is rendered as valid, though no Surrender should have been made to the use of his Will *, as if such Sur-

Doe *v.* Huntingdon, 4 East, 271; Doe *v.* Davidson, 2 M. & S. 175. (1283.)

* (1289,) Where the Custom authorized a testamentary disposition of Copyholds by a Feme Covert, it was held, with good reason, that this Statute did not supersede the necessity of a Surrender to the use of her Will, as drawing with it the due examination and ascertainment of her (1275.) voluntary intention by the Steward. *Doe* v. *Bartle,* 5 B. & A. 492. (1290.) Upon the same principle it would seem, that though newly purchased Copyholds may be surrendered to the uses of a Will made long before, of which the Surrender, as far as those Copyholds are concerned, operates as a republication, (*Heylyn* v. *Heylyn,* Cowp. 130: Sugd. Vend. 176; *Spring* v. *Biles,* 1 T. R.

(1282,1283.) render had been made. This Statute, as it speaks only of *Copyholds*, has been thought by

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435. n.), yet without such Surrender they cannot be included in the Will. But wherever the Surrender is a mere formality, it is impossible, in consistency either with the letter or spirit of the Statute, to attribute any importance to it. (1291.) And yet a Case may be stated in which, according to some opinions, (see 1 Scriv. Cop. 305,) a question of property will depend on the fact of a simple Surrender to the use of a future Will having been made, though since the Statute. This is where a Testator, having both Freehold and Copyhold property, makes a general devise
(952.) of *all his Lands*, or the like. In such a Case a Chattel In-
[952, n.] terest, we have seen would not pass: but whether the rule on that subject be reasonable or not, it is little applicable to Copyholds of Inheritance; which do not differ from Freeholds as Personal from Real Estate, but merely as Real Estate held by a different Tenure and under other rules of Law. And accordingly it has been held (before the Statute) that, if the Copyholds were surrendered to the use of the Will, they would pass with the Freeholds. 2 Atk. 85; 1 Ves. 227. 273. See 15 V. J. 407. But this unfortunately does not remove the doubt; since it has also been decided in Courts of Equity (in cases where the intention of the Testator, independently of the legal effect of his Will, has come in question), that if there were no such surrender, no intention to include the Copyholds in the general description could be presumed. See *Judd* v. *Pratt*, 13 V. J. 168; 15 V. J. 390. And therefore it has been inferred, that in such cases a Surrender is still material as evidence of intention. But again it is to be observed, that where the Testator had a mere Equitable Estate in the Copyhold, which required no Surrender, the general words have been held sufficient. *Car* v. *Ellison*. 3 Atk. 73. And it is submitted that a Surrender to the use of a future Will, before the Statute, could not be evidence of any actual intention to devise; though it was most cogent evidence of a wish to have the power of

some persons not to extend to what are called Customary Freeholds (*b*). (1292.) It may here (267.) Fearne, C. R. 67; Vawser v. Jeffery, 2 B. &

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doing so; while on the other hand the neglect to make such a Surrender, so far as it implies the absence of that wish, implied also an intention to abstain from devising; which is sufficient to authorize the decisions above referred to. But since the Statute there is no room for such a negative implication; and unless the positive inference from an actual Surrender can be carried further than has just been represented, that too is now equally excluded (*a*).

[(*a*) It has recently been decided, in accordance with the arguments adduced in the above note, that copyholds, though not surrendered to the use of the will, will pass by a general devise of real estate, if the will was made since the passing of the Act; (*Doe* v. *Ludlow*, 7 Bing. 275;) but not if the will was made before, though the testator died after, the passing of the Act. (*Doe* v. *Bird*, 5 A. & E. 695.) But, of course, if, in the latter case, the will contained an *express* devise of the copyholds, they would pass, though not previously surrendered. (*Doe* v. *Lawes*, 7 A. & E. 195.) And now, as we have seen, under the late Act on Wills, a general devise of real estate will include copyholds and leaseholds, as well as freeholds. (See above, 952, n.)] [1 Vict. c. 26, s. 26.]

[(*b*) But now, under the late Act, the power of disposing by will thereby given, extends to all real estate of the nature of customary freehold, or tenant right, or customary, or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that he may not have been admitted thereto, or notwithstanding the want of a custom to devise, or the existence of any special custom. (s. 3.) S. 4 provides, that the person claiming under the will shall not be entitled to be admitted, except on payment of the same stamp duties, fees, and fines, as would have been payable if the testator [1 Vict. c. 26.]

A. 462; 2 Swanst. 268; Doe v. Wroot. 5 East, 132. [267, n.] be observed, that a Surrender made after the Will, and amounting to a partial alienation of the Estate, does not operate as a complete revocation of the Will; which may still have its effect upon the reversion or other continuing interest of the Testator.

(1264.) Roe v. Hicks, 2 Wils. 13; Doe v. Vernon, 7 East, 8; Doe v. Tofield, 11 East, 246. (1293.) Admittance is as necessary for the completion of the alienation by ‡ Will as of that which is made by mere surrender. (1294.) Until Admittance, the Purchaser or Devisee cannot himself surrender or (*a*) devise the Tenement; nor if he should by accident be allowed

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‡ (1293. n.) It is usual for the Devisee to bring the Will or Probate into Court; and the Recital of it in the Copy of his Admittance has been held to be Evidence against all persons except the heir of the Testator. 1 Ld. Raym. 735. But see L. Ev. 79, or 2 Bac. Abr. 633.

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had surrendered to the use of his will*, or had been admitted and had afterwards surrendered, (as the case may be,) in addition to the stamp duties, fees, and fines payable on the admittance of such person†. By s. 5, the will or so much thereof as contains the disposition of such real estate, is to be entered on the Court Rolls; and when any trusts are declared, it is sufficient to state in the entry, that such real estate is subject to the trusts declared by the will.]

[(*a*) But see now, as to the general power to devise before admittance, above, 1288, n. *a*.]

[1283.] [* St. 55 G. 3, c. 192, which dispensed with the surrender to the use of the will, contained a like provision. (s. 2.)]

[† And if the land were not, before the Act, devisable, the de-
[1304.] visee shall render the like fine, heriot, and services, as would have been due from the customary heir. (s. 5.)]

to make a surrender, will that be construed into an Admittance by implication, so as to give validity to his act. (1295.) But it is otherwise with the heir who takes a Customary Tenement by Descent; for his title to most purposes is complete at once without admittance (*a*). But as a Fine, in most Manors, accrues to the Lord in consequence of a Descent, as well as of an Alienation, and this Fine in neither case becomes actually due until the new Tenant has been admitted, the Law enables the Lord to hasten the performance of that ceremony by a (*b*) temporary seizure of the Land. (1296.) On

Co. Tr. 94, 95, 96.

R. *v.* Ld. of Manor of Hendon, 2 T. R. 484.

Doe *v.* Hellier, 3 T. R. 162; Doe *v.* Jenney, 5 East, 522.

[(*a*) The heir, before admittance, may maintain ejectment; (*Doe* v. *Crisp*, 8 A. & E. 779;) and he may surrender; (1 Watk. Cop. 245;) but cannot, it seems, *compel* the lord to accept and inrol the surrender until the fine due on the descent be paid; (*R.* v. *Lady of Manor of Dullingham*, 8 A. & E. 858;) and may devise; and, since the St. 55 G. 3, c. 192, without having previously surrendered to the use of his will. (*Right* v. *Banks*, 3 B. & Ad. 664; *King* v. *Turner*, 1 My. & K. 456; *Doe* v. *Wilson*, 5 A. & E. 321; *Doe* v. *Lawes*, 7 A. & E. 195.) The surrenderee or devisee will be liable, on his admittance, to the double fine, *i. e.*, to the heir's fine as well as his own; and can not, it would seem, compel the lord to admit him till the former is paid. (5 A. & E. 323, 324.) And this too, as regards the devisee, would seem to be the law under the provisions of the late Act, 1 Vict. c. 26. (See ss. 4, 5, above, 1291, n.)] [1288.]

[(*b*) Sometime, by special custom, the lord may seize the land *absolutely* as forfeited, and not only *quousque* the heir comes in; but in either case, to justify such seizure, there must have been proclamations, at three consecutive courts, for the heir to come in and be admitted. *Doe* v. *Trueman*, 1 B. & Ad. 736.]

[1315.] the other hand, if the Lord refuse to admit any person who is entitled to become his Tenant, he may be compelled to do so by writ of Mandamus from the Court of King's Bench. (1297.) The Lord may make Admittances out of Court, and even out of the Manor. The Steward may also make them out of Court, but not the Under-steward, unless by special Custom.

R. v. Coggan, 6 East, 431; R. v. Ld. of Manor of Bonsall, 3 B. & C. 173.

Co. Litt. 61.b; Co. 107.

(1272.)

(1280.)

(1298.) The validity of Executory Devises of Copyholds has long been ascertained; and it has been the practice for a Testator intending his Copyhold property to be sold after his death, to give a Power only to his Trustees for that purpose, instead of vesting the Estate in them by his Will. Thus the necessity of an Admittance, and consequently of the payment of a Fine, before the sale can be effected, is avoided. (1299.) With a similar view, the Bankrupt Act of 6 G. 4, c. 16, has provided in s. 68, instead of causing Copyhold property to be vested in the Assignees, "That the Commis-"sioners shall have power, by Deed indented "and enrolled in any of His Majesty's Courts of "Record, to make sale, for the benefit of the "Creditors, of any Copyhold or Customary-"hold Lands, or of any interest to which any "Bankrupt is entitled therein, and thereby to "entitle or authorize any person or persons on "their behalf to surrender the same for the "purpose of any Purchaser or Purchasers "being admitted thereto." And by s. 69, the

Holder v. Preston, 2 Wils. 400.

See 1 Atk. 96.

(242.)

Purchaser is directed to pay the Fine and the Lord to admit him (*a*).

(1300.) Where the Custom has not ascertained the amount of the Fine, the King's Courts of Law (in which alone it can be recovered) will not suffer it to be raised, in ordinary cases, beyond two years (*b*) improved value of the land. (1301.) Where there is a Settlement of Copyholds by way of Particular Es-

1 Watk. Cop. 308.

4 Co. 22. b.; Blackburne *v.* Graves, 1 Mod.

[(*a*) See above, 242, n. (*c*). Where the bankrupt is tenant in tail of copyholds, the Commissioner, we have seen, is empowered to dispose of them as the bankrupt might have done. (See above, 711, n.) And, by s. 58, all the previous clauses of the Act, as to the consent of the protector of copyholds, (for which, see above, 1285, n.) except as varied by the next clause, (s. 59,) are applicable to this case. S. 59 then directs, that the deed of disposition by the Commissioner shall be entered on the Court Rolls, and that where the protector consents by a distinct deed, his consent shall be void, unless the deed of consent be executed on or before the day on which the deed of disposition is executed; and that such deed of consent shall be entered on the Court Rolls, and that it shall be imperative on the lord or steward or deputy-steward, to enter every deed required by this clause to be entered, and that he shall indorse on such deed a memorandum signed by him testifying such entry. By s. 66, the disposition by the Commissioner, except where the estate of the bankrupt is merely equitable, operates as if the lands had been surrendered to the use of the person to whom the same are so disposed of; and he may claim to be admitted on payment of the proper fines, fees, and other dues.]

[(*b*) The amount of rent reserved on the land is not conclusive of the improved value, either against the lord, (*Halton* v. *Hassell*, 2 Str. 1042,) or against the copyholder, (*Ld. Verulam* v. *Howard*, 7 Bing. 327.)]

120; Doe v. Clark, 5 B. & A. 458. tate and Remainder, it is sufficient that he who takes the first Estate should be admitted; but a Fine will be due from each succeeding Tenant when his turn of possession arrives; and therefore it is usual for each to be admitted. (1302.) And when a Reversion or Remainder descends to the heir, he must be admitted immediately, paying a Fine, which is generally half what would be due from a Tenant in possession (*a*). (1303.) Tenants in Common pay Fines proportioned to their shares; and Coparceners one Fine for all. Joint-tenants also pay a single Fine; but where the amount of it is uncertain, it would probably not be confined to two years' value, since on the death of one of them the *Survivor takes his share without any additional payment (*b*).

1 Watk. Cop. 297, 298. 311.

1 Watk. Cop. 298. 312.

1 Scriv. Cop. 395. 375.

(50. 317. 1271.) * (1303. *n*.) Joint-tenants (having been admitted) may also convey their shares to each other by Release. Hale in Harg. Co. L. 59, a. n. 2.

[(*a*) The admittance of tenant for life is also, it seems, the admittance of the reversioner. *Doe* v. *Lawes*, 7 A. & E. 195.]

[(*b*) Where the surrender is to several for life, *successive*, the rule generally is to take for the second life half the sum taken for the first, for the third, half the sum taken for the second, and so on; so that, whatever be the number of lives, the fine is less than double what is taken for the first. This rule was adopted in B. R., in a late case, where fourteen persons were to be admitted, as joint-tenants, as trustees of a charity. *Wilson* v. *Hoare*, 2 B. & Ad. 350.]

[1 Watk. Cop. 312.]

(1304.) The Heriot, which becomes due to the Lord upon the death of his Tenant out of the personal estate of the latter, is clearly distinguishable from the Fine, which (as we have seen) is a debt from the heir or devisee, and does not accrue until Admittance. (1305.) The Heriot is also properly a specific Chattel, as the Tenant's best beast; though it is most commonly compounded for. And therefore, being in its proper nature indivisible, whenever the Tenement is split into shares, the Heriot becomes multiplied; and it has even been held formerly that after these shares had been reunited in the hands of a single owner, the multiplicity of Heriots still continued; but this last opinion has with much reason been exploded, at least as to those cases where there has not been an actual partition of the Tenement into several allotments. (1306.) The same observations are applicable to the customary fees of the Steward; which may very justly be the same for each part of a divided Tenement as for the whole, but ought also to be the same for the whole after reunion as before division.

Co. Tr. 24.

Garland v. Jekyll, 2 Bing. 273; Holloway v. Berkeley, 6 B. & C. 2.

(1307.) The general rules of descent are the same in Copyhold as in Freehold Inheritances (*a*), though more often varied by peculiar

Co. Tr. 116.

[(*a*) And the late Act on the law of inheritance, St. 3 & 4 W. 4, c. 106, expressly extends to copyholds. See s. 1.] [301, n.]

(314.) local Customs; among which that of Borough
4 Co. 22. b. English not unfrequently occurs. (1308.) That
[See now, 303, n.] seisin of the heir which constitutes him a Tenant from whom the inheritance is to be derived on a future Descent, is obtained, as in
(303.) Freeholds, by mere entry, without admittance.
Co. Tr. 117. (1309.) It is to be observed however that Co-
[See now, 1508, n.] pyholds are not Assets in the hands of the heir;
(734.) (1310.) and that a descent does not strengthen the right arising from mere possession by tak-
(367.) ing away the entry of the more worthy claimant.
[367, n.] (348, &c.) (1311.) The rights also of Curtesy and Dower are not necessarily incident to Copyholds; and the latter is commonly established under a form somewhat different from that of Dower at
2Watk. Cop. 69. 87. 73. Common Law. It is called the Widow's Free Bench; a name which seems to signify her right, independant of any Grant, of taking her place among other Copyholders in the Lord's
(1262.) Court. It often extends to the whole Tenement instead of a third part of it; and in many Manors is held during Widowhood, or chaste widowhood only; and it is generally, though not universally, confined to property of which the husband died seised; whence it is no obstacle to alienation. These
1 Watk. Cop. 299. estates, being considered as continuations of that of the deceased, are perfect without Admittance.

Co Tr. 118; 4 Co. 76. (1312.) The right to a Copyhold Estate, if it be not a Right of Entry, must be prosecuted

(a) in the Lord's Court by a process resembling the Action which would be adapted to a similar (375, &c.)
case of Freehold property in the Court of Common Pleas. And therefore the Statutes of Limitation are held to extend to Copyholds(a).
(1313.) A right of entry may also be prosecuted by Ejectment in the King's Courts: for, by the (403, &c.)
general custom of all Manors, every Copyholder may make a Lease for any Term of years if he can abtain a licence from the Lord, and Co. Tr. 119; 4 Co. 26.
even without such licence may demise his Tenement for * one year; and the interest thus

* (1313. n.) In some Manors, Leases may be made without licence for a longer Term, as in that of Highbury (4 Bro. C. C. 415;) and Hackney; *Glover* v. *Cope*, 4 Mod. 80; 3 Lev. 326. In this last Case it was decided that the (856.)
St. 32 H. 8, c. 34, relating to Covenants, &c. running with the land, extends to leases of Copyholds.

(1314.) Terms for years in Copyholds may be created by Surrender, and these are true Customary Estates: but the practice is not usual. In *E. of Bath* v. *Abney*, (1 Burr. 206,) Copyhold Lands having been devised for a Term of years, it was decided that on the death of the Devisee his Executor must be admitted and pay a Fine. If a woman be possessed of such a Term, and marry, her husband may dispose of it, but he is not obliged to be admitted. Co. Cop. Tr. 129. The possession of the Tenant for years, (302. 1301.
after admittance, amounts to such a seisin of the Remain- 1308.)

[(a) But now, all such processes in the lord's Court, or plaints, as they are called, except a plaint for free-bench or dower, are taken away by s. 36 of St. 3 & 4 W. 4, c. 27; and the general provisions of the Act extend to copyholds. See above, 375, n.]

created is not of a Customary nature, but a legal estate for years. (1315.) But in order to try his right by Ejectment, the Lessor of the
(1295.) Plaintiff (unless he claim by descent) must *first have been admitted; since without that ceremony, however perfect his title in other respects, he was never an actual Tenant, and therefore could not be empowered by the Custom to make
R. v. Coggan, 6 East, 431. a Lease. The Court of King's Bench however
(1296.) will issue a Mandamus to the Lord to admit for this purpose any claimant who shows a sufficient *primâ facie* Title (*a*); and this practice is
(1276.) attended with no inconvenience, as the Admittance, if not grounded on a just Title, will be ineffectual: and yet it seems that the Lord is

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derman in fee simple, that the inheritance will be derived from him on a future descent. 1 Mod. 102. 120.; 1 Ventr. 260; 2 Lev. 107.

* (1315. *n.*) It seems to have been thought (*Widowson* v. *E. of Harrington*, 1 J. & W. 532.) that no person can commence a *Real Action* for a Copyhold Tenement in the *Lord's Court* until he has been admitted. But it is certainly very unreasonable that the Lord should thus be called upon first to recognize a person as his Tenant, and then to decide whether he has any right to be so. Some distinctions, and perhaps the origin of a mistake on this subject, may be found in Co. Cop. Tr. 94 & 129.

[(*a*) The heir may have a mandamus to be admitted,
[1295, n.] notwithstanding the completeness of his title without admittance. *R.* v. *Brewer's Company*, 3 B. & C. 172; *R.* v. *Wilson*, 10 B. & C. 80. And where there are two adverse claimants to the same tenements, the lord may be compelled to admit both. *R.* v. *Lord of Manor of Hexham*, 5 A. & E. 559.]

entitled to a Fine. (1316.) The Copyholder in possession may maintain an Action of Trespass not only against Strangers, but against the Lord himself; nor can the latter enter upon the land, even for the purpose of cutting down trees (to which he, as the Freeholder, is principally entitled,) without the Tenant's permission, unless by special Custom. Litt. 82. Whitechurch v. Holworthy, 4 M. & S. 340.

(1317.) The peculiar Evidences of a Copyholder's Title, as we have seen, are the * Copies of Court Rolls; and these are therefore liable to the Stamp Duties. (1318.) The Copy of a Surrender for the purpose of Sale or Mortgage is charged with the *Ad Valorem* duty appropriated to the occasion; (1319.) but if Freeholds and Copyholds be sold together for one sum, the purchase money may be apportioned at the discretion of the parties; (1320.) and upon a mortgage of property so mixed, the whole duty is charged upon the Freehold part. (1321.) In other cases, generally, the Copy of every Surrender, and of every Admittance, is charged with 1*l.*; unless the clear yearly value of the estate does not exceed 20*s.*, when the duty is reduced to 5*s.* on each Copy. (1322.) The proceedings in a Common Recovery (which includes several Surrenders and Admittances) (1261.) (452, 459.) (457.) (1285.)

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* (1317. *n.*) These may be either Copies under the Steward's hand, or ordinary sworn Copies.. 2 Bac. Abr. 632. And it seems that after thirty years the Steward's signature will be presumed to be genuine. 2 Atk. 45; *Wynne* v. *Tyrwhitt*, 4 B. & A. 376. (489.) (446. *n.*)

are charged in the whole with five times the same sum. (1323.) The original Rolls or Books of the Court are expressly exempted; and if the claimant can by favour procure the *production of these on the trial of an Ejectment, he may thus materially lessen his expenses.

Doe v. Hall, 16 East, 208.

(1325.) In every Action in the King's Courts relating to Copyhold property, all Customs which, though sufficiently reasonable to be allowed, the law does not recognise as of universal predominance, must be proved, like other matters of fact, by evidence exhibited to the Jury. The best evidence for this purpose is of course to be found in the Court Rolls. (1326.) And this may be either entirely of a general kind, as where Entries have been made on the Rolls and Customs ascertained and presented by the Homage at the desire of the Lord: (1327.) or it may rest entirely on particular facts; as where a single instance of the Admittance of the youngest Nephew as heir was allowed to decide, that the Custom of preferring the youngest was not confined to Sons; and one instance of the alienation of an Estate Tail by Surrender, followed by the quiet enjoyment of the Surrenderee for a period of which thir-

(1258.)

Roe v. Parker, 5 T. R. 26.

Doe v. Mason, 3 Wils. 63.

(1307.)

Roe v. Jeffery, 2 M. & S. 92.

(1285.)

* (1324.) A Tenant or person who has a good *primâ facie* Title to a Copyhold, may obtain a Mandamus by which the Lord will be compelled to allow him to *inspect* and *take copies* of the Rolls. *R* v. *Shelley*, 3 T. R. 141; *R*. v. *Lucas*, 10 East, 235; *R*. v. *Tower*, 4 M. & S. 162.

(1315.)

teen * years had elapsed since the death of the Surrenderor, was admitted as evidence of a Custom to bar Entails by Surrender. (1328.) Or lastly, the Evidence may consist of an explanation with which particular facts are accompanied; as where in Admittances of Widows to their Free Bench, or of other persons to Estates expectant on those of the Widows, the Free Bench is in words restricted to chaste widowhood, though no instance of an actual forfeiture for incontinence may have occurred. (1329.) General reputation, within the Manor, may also be evidence of a Custom, where the Court Rolls are silent.

Doe v. Askew, 10 East, 520.

(1311.)

Doe v. Sisson, 12 East, 62.

(1040.)

(1330.) Alienations made by the Tenants of particular Estates in Customary Property, as they do not divest the estates of the persons in remainder or reversion, so have not the effect of forfeiture for their benefit. (1331.) But every alienation which is contrary to the nature of the Customary Tenure, is followed by a forfeiture of the estate to the Lord. (1332.) If however the words of an Assurance will bear two constructions, that is of course to be preferred which renders the act lawful; and therefore in a general conveyance of *Lands* and *Tenements,* Copyholds are held not to be included, though (as we have endeavoured to

(1281.1285.)

Co. Litt. 59. a.

Co. Tr. 136; 3 Bac. Ab. 396.

(1291.)

* (1327. n.) It has been held however that Leases made twenty, forty, or even sixty years ago, were not of sufficient antiquity to prove a Custom of leasing without Licence. *Jackman* v. *Hoddesdon,* Cro. El. 351.

(1313.)

[1291, n.] prove) it is otherwise in a Will. (1333.) It seems also to be the better opinion, that a Deed

1 Watk. Cop. 327; but see 1 Bac. Ab. 741. of Bargain and Sale by a Copyholder * amounts only to the creation of a Trust, and not to any

(890.) attempt to dispose of the Customary Estate. (1334.) So a Covenant which, if it related to

(838.) Freehold Lands, would have the effect of an

Doe v. Clare, 2 T. R. 759; Doe v. Lufkin, 4 East, 221; Fenny v. Child, 2 M. & S. 255. immediate Lease, may be construed as an undertaking only for a future Lease of Copyholds. But by a Lease, without license, for more than one year, (unless the Custom authorize the

(1313.) creation of a longer Term,) a like forfeiture

Co. Litt. 59. a. is incurred as by any other conveyance.

(1335.) The Tenant of a Copyhold Estate

1 Bac. Ab. 741; Co. Tr. 131, &c. of inheritance may also forfeit that Estate by Waste. But reason seems to require that the

(718.) Waste which is attended with such penal consequences should be either an invasion of the Lord's property, as by cutting down trees without being authorized † by the Custom; or at least some act or neglect which tends materially to deteriorate the Tenement, or to destroy

1 Bac. Ab. 742. the evidence of its identity. To this last rea-

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* (1333. n.) It has accordingly been held that the St.

(215.) 9 G. 2, c. 36, (which in conveyances to charitable uses require a Deed indented and inrolled,) extends to Copyholds. *Doe* v. *Waterton*, 3 B & A. 149.

† (1335. n.) By the general Custom every Copyholder may take Estovers upon his land. 1 Bac. Abr. 742. And therefore it is not unreasonable that a Forfeiture may be incurred by Permissive Waste. See Hargr. Co. Litt. 63 a. n. 1.

son may also be referred tho Forfeiture which is incurred by an inclosure, or other alteration of boundaries. (1336.) Other causes of forfeiture are, refusal to attend the Customary Court, or to perform any other Service, or pay any Rent, or * Fine incident to the tenure; also (*a*) Felony and Treason; and perhaps a Surrender to the use of an Alien. (1337.) The Lord may recover the forfeited Estate by Ejectment, without prejudice to the Copyholder (if any) in Reversion or Remainder. (1338.) And the Tenant cannot here question the Title to the Manor of the Lord by whom he was admitted. (1339.) But the Lord may in general wave the forfeiture by a subsequent act of recognition of the Tenant. (1340.) And if he neglect to take advantage of the

Id. 739, 740.

1 Bac. Ab. 743. Harg. Co. Litt. 2. b. n. 4.

(189. 192.)

Doe *v.* Clements, 2 M. & S. 68.

Doe *v.* Budden, 5 B. & A. 626.

Co. Tr. 140; Harg. Co. Litt. 63. a. n. 1.;

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* (1336. *n.*) The Cases of Heirs and Devisees, who are Infants or Femes Covert, are provided for by St. 9 G. 1, c. 29 (*b*). See *Lord Kensington* v. *Mansell*, 13 V. J. 240.

[(*a*) If the copyholder surrenders, and afterwards, before admittance of the surrenderee, is convicted of felony, the tenement is forfeited, and the surrenderee is not entitled to be admitted. *R.* v. *Mildmay*, 5 B. & Ad. 254.]

[(*b*) This Statute is repealed by St. 1 W. 4, c. 65, and its provisions are thereby re-enacted and extended, so as to embrace the cases of lunatics as well as of infants and femes covert, and also the cases where any such persons are entitled to admittance otherwise than as heirs or devisees. Ss. 3—10.]

3 T. R. 171; Eastcourt v. Weeks, 1 Salk. 186.

forfeiture in his lifetime, his heir cannot avail himself of it (a).

(1341.) The Lord may become absolutely entitled to a Customary Tenement of inheritance, either by Forfeiture, by Escheat, or by a Surrender made to his own use. And in all these cases, and also upon the expiration* of any Customary Estate where no Customary Inheritance exists, the Lord may make a new Grant of the Tenement in the manner prescribed by the Custom. (1343.) These Grants, like Surrenders, are evidenced by the Court Rolls; and seem to imply in themselves the†

* (1342.) If a Copyhold be limited to *A.* for the life of *B.*, and *A.* die first, the Estate will go to the Surrenderor or Grantor, (See Harg. Co. Litt. 59. b. n. 2,) for there can be no General Occupant of Copyholds, nor is the
(730. 733.) St. 29 Car. 2, c. 3, s. 12, applicable to them (b). *Zouch* v. *Forse*, 7 East, 186. But there may be a special Occupant named in the Surrender or Grant. *Doe* v. *Martin*, 2 Bl. 1148. In many Manors the Custom is only to grant Copyholds for lives; and in some, to grant them to three persons for their lives successively as they are named, but so that the first has an absolute power of alienation. *Swift* v. *Davis*, 8 East, 354. n.; *Doe* v. *Goddard*, 1 B. & C. 522.

† (1343. *n.*) The Stamp Duty on the Copy of a Grant of this kind, whether with or without Admittance, (if it be not in the nature of a Sale or Mortgage, so as to require an
(452. 459.) (1321.) *Ad Valorem* Duty,) is equal to that on a Surrender and Admittance taken together.

[(a) See the distinction in this respect, between a seizure
[1295, n. b.] for forfeiture and a seizure *quousque*, in *Doe* v. *Trueman*, 1 B. & Ad. 743. 745.]

[(b) But copyholds *pur autre vie* are within the provisions of the late Act, 1 Vict. c, 26. See ss. 3, 6, 34, above, 733, n.]

Admittance of the Grantee, though that is often effected by a distinct ceremony. (1344.) Any separation of the Tenement from the Manor, by a conveyance or lease unauthorized by the Custom, for ever destroys its Customary quality, if the Lord were seised in fee simple; but if he had only a particular Estate in the Manor, this quality would only be suspended during the continuance of that Estate, or of the derivative estate created by the conveyance or lease. (1345.) And if no such separation be made, the capacity of being granted according to the Custom may remain dormant for any length of time. (1346.) If the Tenement has formerly been enjoyed as a Copyhold of inheritance, it may be granted either in fee or for any less estate; though if it has only been granted anciently for a less estate, the limits thus fixed by usage cannot be exceeded. And in all other respects, (as the reservation of rent and other services,) the Custom must also be strictly observed. (1347.) In any question upon the legality of these grants, the Title of the Lord to the Manor cannot be absolutely disregarded; but it is sufficient if he have any lawful estate at the moment, though it should be only a Tenancy at Will, or defeasible by Condition, and though he himself should be an infant, or otherwise disabled. For though the Grant, being in effect an alienation of part of the Demesnes of the Manor, cannot be made by one who has no lawful property in it; yet

Roe v. Loveless, 2 B. & A. 453.

Harg. Co. Litt. 58. b. n. 7.

Co. Litt. 58. b.

Co. Litt. 52. b.

Co. Tr. 90, 91.

Co. Litt. 58. b.; Co. Tr. 67. (1277.)

its operation is not derived out of the interest of the Grantor: but rather from a Power, which is at once committed to him, and regulated in its exercise, by the Custom. (1348.) In some Manors it is customary to make original grants of portions of the Waste, to be held for the first time by a Copyhold Tenure; but without a particular Custom such grants cannot be supported; (1349.) nor will a custom be allowed by which all parts of the Waste might be granted without limit or restriction, as that would tend to deprive the Copyholders of a right of Common which they have by the general Custom. (1350.) In many instances the consent of the Homage, (*i. e.* of the Tenants present in Court,) is necessary to the validity of such a Grant: but where this does not appear to be requisite, still the Custom, however seemingly indefinite, may perhaps be supported, on the ground that whenever its exercise becomes prejudicial to the Tenants, they may have their remedy; as by analogy to the Statute of Merton, the Custom must thenceforward lose its force.

Lord Northwick v. Stanway, 3 B. & P. 346.

(1044.)

2 M. & S. 509; 2 B. & A. 191.

Badger v. Ford, 3 B. & A. 153.

(1262.)

(1149.)

(1351.) If the Lord make a legal Conveyance of the Copyholder's Tenement to him in fee simple, the Tenement is said to be *enfranchised*. The general doctrine on this subject seems to depend on the principle that the Copyholder is a Tenant at Will, and that therefore by the accession of the Reversion his estate is merged. (1352.) If such a convey-

(1260.)

ance be made to one who is * Tenant in Tail of the Copyhold, the extinction of the Customary Tenure is no less absolute than if he had been Tenant in fee simple. (1353.) And it appears to have been held, that if he were only Tenant for Life, a like extinction would take place, and the Copyhold Estate in remainder or reversion would also be turned into a Freehold Estate. But this seems to be more properly a matter of equitable cognizance; and the opinion alluded to may be thought to attribute a somewhat extraordinary operation to a legal Conveyance, as well as to contradict a more ancient decision. (1354.) It is clear, at least, that if the Freehold Estate had been conveyed to a mere stranger, who had no interest in the Copyhold, all the subsisting Customary Estates in the same Tenement would still have continued: but in such a case, if the Copyholder be out of possession, though he may still proceed by Ejectment, he can obtain no remedy in the Lord's Court, because the Land is no longer parcel of the Manor; (1355.) nor, when he is in possession, can he resort to the Customary mode of alienation: and therefore the most beneficial interest in the Tenement is no longer alienable without the

Dunn v. Green, 3 P. W. 9; Challoner v. Murhall, 2 V. J. 524.

Roe v. Briggs, 16 East, 406. 415.

M. Podger's Case, 9 Co. 104.

Co. Tr. 84.

(1313.) [See 1312, n.] (1259. n.)

* (1352. n.) The Custom in the Manor of Wakefield of barring Entails by an act of Forfeiture and a re-grant in fee from the Lord, (*Grantham* v. *Copley*, 5 Saund. 422,), seems grounded on a similar principle. (1285.)

concurrence of the Freeholder, who possesses little more in effect than a remote reversion.

(1356.) Besides the inconveniences of Customary Tenure which must have already occurred to the reader, we may observe that the Tenements so held, though they confer no right of (*a*) voting for the County, yet as a qualification for serving on Juries are placed on the same footing with Freeholders by St. 6 G. 4, c. 50, s. 1. As to the qualification for killing Game under (*b*) St. 22 & 23 Car. 2, c. 25, s. 3, there seems to be no difference between Copyholders and Freeholders.

Harg. Co. Litt. 59. b. n. 1. (834.)

CHAP. VIII.

OF EQUITABLE ESTATES AND INTERESTS, AND OF REMEDIES IN EQUITY.

SECT. 1.—*Of Trusts expressed or plainly implied.*

(1357.) THE Jurisdiction of Courts of Equity has arisen out of the imperfection of the Courts of Law, and the inadequacy of their procedure for defending and enforcing many rights which cannot with safety be left unprotected. Whe-

[(*a*) But see now St. 2 W. 4, c. 45, noticed above, 834, n.]

[(*b*) See now St. 1 & 2 W. 4, c. 32, noticed above, 834, 2 n.]

ther it was originally possible, or is now practicable, so to model the constitution of the Courts of Law, that every question of right and duty which is properly cognizable by any of our tribunals shall be there sufficiently decided; or whether the advantages which those Courts possess in the administration of justice are necessarily connected with certain defects, which must always call for the aid of a supplementary judicature; is a subject of far too extensive inquiry for this place; where it is proposed only to exhibit an outline of the existing effects of Equitable Jurisdiction on Real Property.

(1358.) This jurisdiction is either exclusive of, or concurrent with, that of the Courts of Law. But that only can properly be called an Equitable Estate or interest, for which a Court of Equity affords the only remedy: and of this nature, in the first place, is the benefit of every Trust which is not converted into a Legal Estate by the Statute of Uses. (1359.) Such Trusts may be either express, or implied; and the operation of the Statute may be excluded either by the nature of the subject matter, as in the case of Chattels, and Customary Estates; or by (129. 1286.)
an express declaration of the Use to the Trustee; or by the nature of the duties imposed upon him by the Trust, if they cannot be con- (126. 168.)
veniently performed unless the Legal Estate be 4 T. R. 63.
vested in him.

(1360.) The simplest kind of Trust, (which though it arises more often from accident than from design, and might perhaps without inconvenience be abolished, yet is the fittest for our immediate consideration,) is where Freehold
(152. 281.) Land is conveyed or devised to the Use of *A.* and his heirs in trust for *B.* and his heirs. Here the Equitable Estate of *B.* much resembles the Use as it was allowed to exist before the Statute: but in some respects it conforms more nearly to the nature of a * Legal Estate.
Burgess v. Wheate, 1 Bl. Rep. 123; Langley v. Sneyd, 1 S.&S. 45; Hawkins v. Shewen, Id. 257.
(1361.) Indeed the general rule at this day is that Equity follows the Law; and therefore the Descent of an Equitable Fee is regulated by the same canons as that of the Legal Inheritance; (1362.) and a husband may acquire an interest in his Wife's property of this kind as Tenant by the Curtesy, though that was not among the incidents of the ancient
(349, &c.) Use. (1363.) The right however of the Wife
[See now, 349, n.]
to Dower, from a mistaken judgment perhaps

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* (1360. *n.*) The right of voting in the Election of Members to serve in Parliament belongs to the Proprietor, whether legal or equitable, who is in possession of the Land. See St. 7 & 8 W. 3, c. 25, s. 7 (*a*). By St. 9 Ann. c. 5., a Mortgagee cannot derive from the mortgaged Estate a qualification to sit in Parliament, unless he have been in possession seven years.

[(*a*) This provision, so far as regards County elections, is re-enacted by s. 23 of the Reform Act, St. 2 W. 4, c. 45.]

at first, but afterwards from the expediency of following precedents, has never been conceded to her: (1364.) and it has also been decided (1021.)
that there can be no Escheat of the beneficial interest arising from a Trust; but that if the Equitable Owner die without heir and intestate the Trust will cease, and the Trustee become absolutely entitled to the property. On the other hand, if the Trustee should die without heir, it seems not to be settled whether the Lord, taking the Land by Escheat, would be subject to the Trust (*a*). (1365.) But the ordinary 1Sand.Us.351.
claims of a Husband, Wife, or Judgment Creditor, (348. 875.) of the Trustee, however available at Law against the Trust property, would be restrained by a Court of Equity; or at least the parties enforcing them would themselves be declared Trustees, and would be charged with all the costs of litigation.

(1366.) The declaration of Trust upon a (115, &c.)
Conveyance of the Legal Estate answers to a similar Declaration of Uses before the Statute; and a Trust may also be created by means analagous to a Bargain and Sale, if there be such a Consideration as the Law requires in a Conveyance which it shall not pronounce merely (223.)

[(*a*) But now, as we have seen, where the trustee dies [205, n. *a*.]
without an heir, the Court of Chancery may appoint a person in his place to convey the estate; and further, there is no escheat or forfeiture of lands held on trust, in consequence of the attainder or conviction of the trustee. See St. 4 & 5 W. 4, c. 23, ss. 2, 3.]

voluntary. Thus Articles of Agreement made before Marriage, for a Settlement on the Husband or Wife and Issue, are sufficient to raise a Trust without any Conveyance. And a written Agreement for the Sale of Land has the like effect, if the state of the Title, or other circumstances, do not afterwards cause it to be waved or rescinded. (1367.) If however the Sale be by auction, under the direction and according to the official forms of a Court of Equity, in execution of its own Decree, the Contract is not considered binding until sanctioned by the peremptory Order of the Court; which also still reserves to itself a discretion of setting aside the Sale if a much higher price be offered.

Sugd. Vend. 50. 55.

(1368.) As length of time, or ambiguous expressions in an Instrument, may sometimes make it doubtful whether the Estate is Legal or Equitable, it is thought prudent, and has become the general practice, to make use of the same kind of Assurance for transferring the beneficial interest in Land, whether the Legal Estate happened to be vested in the true owner or in his Trustee. (1369.) And with respect to Estates Tail, and the rights of Married Women, the Courts of Equity require that (a) Fines and * Recoveries should be employed for effect-

* (1369. n.) These (a) Fines and Recoveries are trans-

[682, n.] [66, 2 n.] [(a) And the powers of disposition given by St. 3 & 4 W. 4, c. 74, to tenants in tail and to married women in the place of fines and recoveries, extend to equitable as well as to legal estates and interests in land.]

ing those alienations of the Equitable which could not otherwise be made of the Legal Property. (1370.) But in other cases the only indispensable formality is that required by the 9th section of the Statute of Frauds, which enacts "That all Grants and Assignments of "any Trust or Confidence shall likewise be in "Writing, signed by the party granting or assigning the same; or by such last Will or "Devise;" (meaning such a Will as is required by s. 5;) "or else shall likewise be utterly void "and of none effect." 1 Sand. Us. 342; 1 Russ. 210. (260.)

(1371.) By the 10th Section of the same Statute (as we have seen) a Trust Estate of this kind is made extendible on an Elegit; and it is also made Assets by Descent in the hands of the heir, in the same manner as if his Title (882.) [See now, 882, n.] (34.)

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acted in the same Court and with the same solemnities as if they related to the Legal Estate; and yet, for want of a subject on which they may operate, they must be considered in a Court of Law as absolutely void. The Tenant to the Præcipe in an Equitable Recovery is required to have the immediate Equitable, or at least beneficial, Estate of Freehold in the land; the mere Legal Estate of a Trustee, without any right of enjoyment, not being sufficient for the purpose. But it is no objection to the validity of an Equitable Recovery that the Legal Freehold happens to be superfluously vested in the Tenant to the Præcipe; (Sugd. Vend. 329; 18 V. J. 418;) nor on the other hand that the Equitable Tenant for life had previously mortgaged his Estate; for he may still, by force of his Equity of Redemption, make a sufficient Tenant to the Præcipe. 1 Turn. 29. (689.)

were Legal. (1372.) Before this provision it constituted not Legal, but Equitable Assets; which, according to the rule of equality which Equity asserts, were to be distributed among the Creditors of the deceased in proportion to the amount of their just claims, so far as they were binding on the heir, without any further regard to the nature of the securities on which they were grounded.

2 Fonbl. 401.

(886.)

(1373.) It is commonly said that of an Equitable Estate there can be no Disseisin: and it is an established principle, that as between a declared Trustee and the *Cestui que Trust*, (or person for whose benefit the former is entrusted,) no length of time can extinguish the Trust (*a*). (1374.) And though with respect to the operation of a Fine levied by the Trustee, the judicial doctrine seems to have undergone great alteration, it may now perhaps be considered as settled that the Trust cannot be barred by the mere operation of that Assurance and five years non-claim.

See 2 J. & W. 18.

Salsbury *v.* Bagott, 2 Swanst. 609; 2 Atk. 631; Kennedy *v.* Daly. 1 Sch. & Lefr. 355. [See 66, n.]

(1375.) There is one way however by which, though involving a breach of Trust, the Legal Estate in the Land may be discharged from the Equitable ownership of the Cestui que Trust; for if the Trustee make a conveyance, for valuable consideration, to a person ignorant of the Trust, there remains no Equity to be enforced against the innocent Purchaser (*a*); (1376.)

1 Sand. Us. 320; Sugd. Vend. 694. 709.

[(*a*) See ss. 25, 26, of St. 3 & 4 W. 4, c. 27, below, 1379, n.]

nor can the land be again subjected to the Equitable Right by knowledge communicated to a subsequent purchaser, unless it be reconveyed to the Trustee himself; in whom the Trust, though broken, must always continue. (1377.) But in order to prevent the possibility of such an alienation, the Trusts are most commonly declared, or referred to, by the same Instrument which gives the Legal Estate to the Trustee.

(1378.) Where the Trust or Equity is clearly subsisting, though the person entitled to it cannot, properly speaking, be disseised, yet if he suffer another claimant to take possession of the land, and neglect for a length of time to enforce his remedy against him, his Suit will ultimately be discountenanced or rejected (*a*). It does not appear however that any period has been definitely fixed as sufficient for this purpose in all cases. The Statutes of Limitation are applicable, in terms, to legal rights only; and it has formerly been denied that Equitable Claims could be subjected to them by any strict analogy. (1379.) Lately, indeed, an authoritative opinion has been pronounced, that Courts of Equity, as they are confined to one uniform mode of remedy by *Bill*, cannot take notice of more than one period of Limitation; and that on the other hand they are

(1373.)

1 Scho. & Lef. 428; Salsbury *v.* Bagott, 2 Swanst. 609. But see Aggas *v.* Pickerell, 3 Atk. 325. Also 2 J. & W. 149, &c.

2 J. & W. 192.

[(*a*) See s. 27 of St. 3 & 4 W. 4, c. 27, below, 1379, n.]

(370.) bound by the Statute of James as a positive law, restraining them from giving relief after twenty years of neglect, when not imputable to disability. The first of these assertions appears not to admit of any question; but it would not perhaps in all cases be safe to rely absolutely on the second (*a*).

See 1 Fonbl. 334; Oliver *v.* Court, 8 Price, 170; Dillon *v.* Parker, Jac. 505; 1 Turn. 11, 12. 11. 118.

[St. 3 & 4 W. 4, c. 27.]

[(*a*) But now, by s. 24, of the late Act for the Limitation of Actions, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which he might have made his entry or distress or brought his action, if he had been entitled at law to the same estate, interest, or right;—provided,

[See 370, *n.* 371, *n.*]

S. 25, that when the land or rent is vested in a trustee on an express trust, the right of the *cestui que trust* or any person claiming through him, to bring a suit against the trustee or any person claiming through him to recover the same shall be deemed to have first accrued at the time at which it shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and those claiming through him. And,

S. 26, in every case of a concealed fraud, the right of any person to bring a suit in equity for recovery of the land or rent of which he may have been deprived by such fraud, shall be deemed to have first accrued at the time at which such fraud shall or with reasonable diligence might have been discovered; provided that nothing in this clause contained shall enable any owner of land or rent to have a suit in equity for the recovery thereof on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time he made the purchase, did not know and had no reason to believe, that any such fraud had been committed. And,

S. 27, nothing in the Act contained shall be deemed to

(1380.) Where a fine is levied by Cestui que Trust in possession of a particular Estate, (1374.) whether for life or in tail, its operation upon See 1 Sand.Us. 284, &c. [See now, 66, n.] the ulterior Estate is doubtful. If indeed the Estates were Legal, the person in remainder or reversion would be barred after five years from the time when, if no such act had been done, he would have become entitled to the possession; but the Estates being only Equitable, it may be contended that from the nature of such interests, the ulterior Estate is not displaced or divested by the Fine; and then the non-claim (99. 1373.) can have no effect. The question therefore here is, whether Equity ought to follow the Law in its results, or rather in its principles. The former mode of imitation is recommended by its convenience, the latter by its scientific accuracy; but while it is doubtful which shall be preferred, both these advantages are inevitably lost. (1381.) And perhaps the best mode of deciding the question would be to distinguish between an Estate for Life, and an Estate Tail: for in the case of the former it is impossible to preserve the Analogy of Result in all its particulars, since there can be no Forfeiture of an Equitable Estate for improper (745.) alienation; and as the reversioner does not receive the advantage which the Common Law

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interfere with any rule of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the Act.]

would afford him in a like case, it is unjust that its rules should be applied merely to his prejudice. Here therefore, it may be thought, the Analogy of Principle ought to be followed, according to which the ulterior Estate, not being divested by the Fine, cannot be barred by Nonclaim. (1382.) On the other hand, if Cestui que Trust in Tail levy a Fine, the Analogy of Result is not liable to the same objection; and the Analogy of Principle would be stretched beyond its due limits, if applied to the protection of that interest from the operation of a Fine, which might have been entirely cut off by a Recovery.

1 Sand.Us.269. (1383.) All the rules relating to the limitation of Estates are in general the same in Equity as at Law; and among the rest, the (339. 653.) Rule * in Shelley's Case is strictly observed. 1 Sand.Us.310; Fearne, C. R. 90, &c. (1384.) But an exception must be made of such limitations as are not complete in themselves, but refer to some future Conveyance or Settlement agreed or directed to be made. Thus in a Contract for Sale, it is not necessary to use the word "heirs." So where Articles have been signed before Marriage, stipulating that the Husband shall settle his lands upon himself and the heirs of his body, he can-

* (1383. *n.*) This rule however can have no application unless the Freehold Estate given to the Ancestor, and the Remainder to his heirs, be both Legal, or both merely Equitable. See Fearne, C. R. 52, &c.

not after the Marriage, by a literal or technical construction, be made Tenant in Tail; but such a Settlement must be made on his Children as is usual on similar occasions. (776.) (1385.) And the same course has been followed in many cases where the duty of making a Settlement has been cast upon Trustees by a Will, containing the like general Instructions for that purpose. Such Trusts are said to be *Executory*, in opposition to Trusts *Executed*, in which the limitations are originally complete, without the intervention of any act of the Trustee.

(1386.) Forfeiture, as before mentioned, is not incident to the alienation of Equitable Estates; nor can such alienation have the effect of destroying Contingent Remainders, or any other violent operation. (1387.) A less Estate may indeed be merged in a greater, as at Law, though not if there be any consequent inconvenience; (1388.) and whenever an Equitable Estate becomes united in the same hands with an exactly coinciding Legal Estate, the former is extinguished. (1389.) But as in this last case the old beneficial interest or property continues, although it has assumed that form which subjects it to the jurisdiction of Courts of Law, the Equitable Estate may be considered as still subsisting for some purposes. Thus if Cestui que Trust in fee simple, devise the land by Will, and then take a Conveyance from his Trustee to himself in fee simple, so that his Legal

(1381.)

Fearne, C. R. 321.

(770, &c.)

1 P. Wms. 141.

(747, &c.)

Selby *v.* Alston, 3 V. J. 339; Phillips *v.* Brydges, Id. 120; Merest *v.* James, 6 Mad. 118.

Rawlins *v.* Burgis, 2 V. & B. 382. See Sugd Vend. 162. n.

(267.) (a) exactly corresponds to his former Equitable Interest, the devise will be supported in Equity.

(1369. n.) And (as before observsd) an Equitable Tenant in Tail in Remainder may suffer a good Recovery, if the immediate beneficial Interest of Freehold be vested in the Tenant to the Præcipe, although it be accompanied with the Legal Estate.

(1390.) With respect to Married Women, the power which the Law, departing from its general principles, has allowed them to exercise

(207.) (when given or reserved to them in due form) over the Uses of Land, has been improved, in the modern system of Equity, into a capacity of holding property in total independence of

1 Fonbl. 103. &c. their husbands. This is regularly effected by means of a Trust for the Lady's separate use; which, in respect of the property to which it extends, causes her to be considered in a Court of Equity in the same light as an unmarried woman, and therefore carries with it the right of alienation. (1391.) But in order to render her personal enjoyment of this property more secure, it is not unusual, in the creation of the Trust, to impose an absolute restraint upon all

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[(a) Where such exact correspondence was not preserved, the will was, in most instances, revoked. See *Ward* v. *More*, 4 Mad. 368; *Bullin* v. *Fletcher*, 1 Keen. 369; S. C. 2 My. and C. 432. The rule was frequently difficult of application, and generally defeated the testator's intention. It is now, *i. e.*, in wills made on or since the 1st of Jan. 1838, no longer applicable. See St. 1 Vict. c. 26, ss. 23, 24, above 267, n. (a).]

alienation or anticipation of the income; which being in effect but a partial restoration of her legal disability, is allowed to prevail, if * expressed with sufficient precision (*a*). (1392.) Where a gift is made to a married woman for her separate use, without the interposition of a Trustee, the husband becomes a Trustee for his Wife; for it is a settled rule that a Trust shall never fail for want of a Trustee. The Husband may also, by a written Agreement entered into before Marriage, without any Conveyance, invest his Wife with Equitable powers of separate enjoyment and disposition of her Estate. Sug. Pow. 157.

* (1391. *n.*) It is not sufficient for this purpose to direct that the money be paid into her own hands and not otherwise, with a declaration that her receipt alone shall be a sufficient discharge to the Trustee; for these expressions are considered as pointing only to the exclusion of the Husband. *Acton* v. *White*, 1 S. & S. 429; *Gullan* v. *Trimbey*, 2 J. & W. 457: Sugd. Pow. 119.

[(*a*) Where the trust for the separate use, with a restraint on anticipation, is created in favour of an unmarried woman, marriage not being at the time in immediate contemplation, but with a prospective view to any future marriage, she is not prevented from disposing of the property while she continues unmarried, or, again, on her becoming a widow. But, after some conflict of opinion, it seems to be now decided, that on marriage, if no previous disposition or settlement has been made, the trust for the separate use, with the accompanying fetter on alienation, will attach. See *Tullett* v. *Armstrong*, 1 Beav. 1; (affirmed by L. C.;) *Clark* v. *Jaques*, ib. 36; *Dixon* v. *Dixon*, ib. 40.]

(1393.) In general the rules of Evidence are the same in Equity as at Law; though the witnesses are not brought into open Court, but are privately sworn to the truth of written depositions, made in answer to questions prepared for the purpose. (1394.) But there is one material difference in practice between the two jurisdictions. For in Equity the Defendant is always put to his oath; and his positive denial will not be outweighed by the testimony of a single witness. And hence it is evident that questions of Trust cannot be entertained by the Courts of Law without a considerable alteration of the system.

See 2 Fonbl. 448, &c.

See 6 V. J. 185.

(1395.) Where Copyholds are made the subjects of Trust, the Equitable Estate possesses in general all those incidents of the Customary Property which directly concern the Tenant, but not those which are established merely for the benefit of the Lord; it being sufficient for the latter to have the person named in the Roll for his Tenant, without troubling himself to know that he is a Trustee. The rules of descent therefore, and the effect of words of limitation, are those which the Custom prescribes; but alienation, except in the cases of Femes Covert and Tenants in Tail, may be effected without Surrender, or other Ceremony, beyond the Writing and Signature required by s. 9 of the Statute of Frauds. (1396.) And it has been decided, (long before the St. 55 G. 3, c. 192,) that the Trust of a Copyhold may be devised,

Pullen v. Middleton, 9 Mod. 483.

[See now, 1285, n.] (1370.)

Tuffnell v. Page, 2 Atk. 37. See Doe v.

without a Surrender, by an (a) unattested Will. From which it seems to follow that where the Cestui que Trust is a married woman, without any power of separate disposition, and whose mere assignment in writing would therefore be ineffectual, she may yet dispose of her Estate (with her husband's concurrence) by the ordinary form of Surrender in the Lord's Court, if the Lord or his Steward will accept the Surrender of a person who is not actual Tenant. For though it may not be usual for the Surrenderors to affix their Signatures to the Court Roll, and the 9th section of the Statute requires a Signature to the Assignment of a Trust; yet as the same enactment requires the Devise of all Trusts to be attested by three witnesses, (for so the words "*such* last Will or devise," by reference to a former part of the Statute, must be understood,) and this requisite has been dispensed with in the case of Copyholds from analogy to the Customary mode of testamentary alienation; there is at least as much reason for dispensing with Signature upon an Assignment by Surrender, where the Customary form of alienation is actually pursued. And perhaps the word "likewise" in s. 9, may be considered, to this extent, as referring to s. 3, where Copyholds are expressly excepted.

Danvers, 7 East, 299. (1288.) (1390.) (1275.) [See now, 1275, n.] 7 East, 323. (167.)

(1397.) Chattel Interests may also be held in Trust, and in this way Settlements of them

[(a) Now, of course, the Will must be executed as required by s. 9 of St. 1 Vict. c. 26; above, 260, n.].

Fearne, C. R. 407. are commonly made; in which the rules of Equity are the same with those which regulate (946, &c.) Executory Bequests of such Interests at Law.

(1398.) It is a frequent practice to declare the Trusts of Chattels for this purpose by reference to the Uses to which Freehold Lands are (776.) subjected by the same Settlement; in consequence of which, the Tenant for life of the Freehold property is also entitled for his life to the Leasehold; but the first person who be- (946, &c.) comes Tenant in Tail, whether in possession or vested remainder, of the former, acquires an (937.) absolute interest in the latter, and may even [But see 937, n.] dispose of it by his Will at the age of eighteen or earlier: (1399.) but a Proviso is commonly added to restrain this power, and preserve a contingent interest to the next person in remainder, by suspending the final vesting of the Shifting Trust until the full age of the Tenant in tail; and this provision is free from objection, if it be not extended beyond the limits which the Law has prescribed for the See Marshall v. Holloway, 2 Swanst. 432. vesting of Personal property; that is, if it be confined to the minorities of persons to be born (784.) within the compass of some life pointed out [See 785, n.] by the Settlement or Will, and existing when (824.) the Deed is executed, or at the death of the Testator.

(1400.) There is a kind of Trust, created or declared by Statute, which may properly be considered in this place, to which Chattel Interests in Land, whether Legal or Equitable,

as well as other kinds of Personal Estate, occasionally become subject. For the duty of an Administrator to distribute the property of an (959.) Intestate among his relations has evidently the nature of a Trust; and hence Courts of Equity have obtained a concurrent jurisdiction with the Ecclesiastical Courts in compelling its performance. The principal enactments on the subject are as follows:

(1401.) By St. 22 & 23 Car. 2, c. 10, s. 5, the Surplusage (after payment of debts and expenses) is directed to be thus distributed: "One third part of the said Surplusage to the "Wife of the Intestate, and all the * residue by "equal portions to and amongst the Children of "such Persons dying Intestate, and such Persons "as legally † represent such Children, in case

* (1401. n.) If there be no Wife, of course the children, or an only child, will take the whole. Nor is it material whether all the children are by the same wife: nor is a posthumous child excluded. Toll. Ex. 374.

† (1402.) The Legal Representatives here meant are not the Executors or Administrators of the deceased Children, but their children or descendants; which may be thought to appear sufficiently from the seventh section of the Statute, by which the limits of representation are fixed. A Child therefore who dies without issue, in the lifetime of the Intestate has no representative to whom a share in the distribution can be assigned. But the Children of a deceased Child are entitled to an equal division among themselves of the share which would have belonged to their parent if living; and the same rule of representation would be applicable, if any of these had died leaving children, who would thus be in the third

" any of the said Children be then dead, (1404.) " other than such Child or Children (not being " Heir at Law) who shall have any estate by the " Settlement of the Intestate, or shall be ad- " vanced by the Intestate in his lifetime by " Portion or Portions equal to the Share which " shall by such distribution be allotted to the " other Children to whom such distribution is " to be made: and in case any Child other " than the Heir at Law, who shall have any " estate by Settlement from the said Intestate, " or shall be advanced by the said Intestate in " his lifetime by Portion not equal to the share " which will be due to the other Children by

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degree from the Intestate; for there is no limit to representation in the direct line of the Intestate's own posterity. (1403.) It has been thought, however, that where the claimants are all in the same degree of lineal descent from the Intestate (as Grandchildren after the death of all his Children), the distribution is not to be made on the principle of representation, but by the more simple rule or personal equality; or, as it is commonly expressed, *per capita* and not *per stirpes*. See Toll. Ex. 375. But it may be doubted whether this was the intention of the Statute; and the authorities, (as *Davers* v. *Dewes*, 3 P. Wms. 40; *Lloyd* v. *Tench*, 2 Ves. 213, &c.) which establish that mode of distribution in the case of Collaterals, under s. 6, are grounded upon a reason which does not apply to the issue of the Intestate; (*viz*. that where all take as equally *next of kin*, the words of the Statute afford no room for the introduction of representative claims.) For there is no mention of the Next of Kin, in any part of the Statute which precedes the supposition of a failure of the Intestate's issue.

" such distribution as aforesaid; then so much " of the Surplusage of the estate of such Intes- " tate to be distributed to such Child or Chil- " dren as shall have any Land by Settlement " from the Intestate, or were advanced in the " lifetime of the Intestate, as shall make the " estate * of all the said Children to be equal as " near as can be estimated: but the Heir at " Law, notwithstanding any Land that he shall

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* (1404. *n.*) This provision for the equalization of shares resembles one in our old Law (see Litt. s. 266, &c.) where one of several Coparceners had been advanced by a Gift in Frank Marriage from their common Ancestor in (316.651.*n.*)
his lifetime, and was therefore not allowed to take her share with the rest without first adding the value of the land, which had been given to her, to that of the estate which remained to be divided. This was called bringing her Frank Marriage Land into *Hotchpot;* and the word is now generally used to signify any similar contribution of an ingredient to the partible mess of family property, as in the present instance. As to the nature of the Settlement, or Advancement of a Portion, intended by the Statute, see *Edwards* v. *Freeman,* 2 P. Wms. 435; 1 Eq. Cas. Ab. 149; also 3 P. Wms. 317. n. (1405.) The *Words* of the Statute seem at first to exempt the distributive share of the Heir at Law from any deduction even in respect of Personal property bestowed on him by the Intestate; but this point has been decided otherwise, (Ca. t. Talb. 278. 280.) upon the explanatory clause at the end of the section. (1406.) The contribution, it is evident, is directed for the benefit of the other Children, and not of the Widow. Pre. Cha. 184. (1407.) The issue of a deceased Child must bring in the value of a portion advanced to their Parent, whom they represent. *Proud* v. *Turner,* 2 P. Wms. 560.

"have by Descent or otherwise from the In-"testate, is to have an equal part in the distri-"bution with the rest of the Children, without "any consideration of the value of the Land "which he hath by Descent, or otherwise from "the Intestate."

(1408.) S. 6. "And in case there be no "Children nor any legal Representatives of "them, then one moiety of the said estate to "be allotted to the Wife of the Intestate, the "residue of the said estate to be distributed "equally to every of the Next of Kindred of "the Intestate,* who are in equal degree, and "those who legally represent them."

(1408. *n.*) The computation of degrees of kindred is here to be made according to the rules of the Civil Law of Rome, from which the Statute is in a great measure taken. Lineal descendants then being out of the case, none but Parents can be in the first degree; and it would follow that a Father or Mother of the Intestate, surviving him, would be entitled, if he left a Widow, to one half, if no Widow, to the whole of his clear personal property. (1409.) But by St. 1 Jac. 2, c. 17, s. 7, it is provided, "That if *after the death of a Father* any of his Children "shall die intestate without Wife or Children, in the "lifetime of the *Mother;* every Brother and Sister, and "the Representatives of them, shall have an equal share "with her." And it has been decided that, upon the intention of this Statute, if the Intestate leave a Wife, as well as Brothers and Sisters and a Mother, one Moiety is to be divided among the latter. *Keylway* v. *Keylway,* 2 P. Wms. 344. (1410.) Grandfathers and Grandmothers are in the second degree, as well as Brothers and Sisters; but it has been decided that the latter shall be preferred

(1411.) S. 7. "Provided, that there be no "representations admitted among Collaterals "after * Brothers' and Sisters' Children: and "in case there be no Wife, then all the said "estate to be distributed equally to and "amongst the Children: And in case there be "no Child, then to the next of kindred in "equal degree of or unto the Intestate, and "their legal representatives as aforesaid, and "in no other manner whatsoever."

(1412.) By s. 8, for the security of Creditors, no distribution is to be made until one year after the Intestate's death; and Bonds are required from the persons to whom the shares

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to and exclude the former. *Evelyn* v. *Evelyn*, Amb. 191. But a Grandfather or Grandmother who is in the second degree, will exclude an Uncle or Aunt, who is in the third; for the degrees are reckoned upwards and downwards through the common progenitor. Nor is any distinction made with respect to sex, or half blood, *Blackborough* v. *Davis*, 1 P. Wms. 41; and see 2 Ves. 214. [Jessopp *v.* Watson, 1 My. & K. 605.]

* (1411. *n.*) The right of representation among the Intestate's own posterity extends to the remotest degree; but by this sectiou it is confined, where he dies without issue, to the children (excluding the grandchildren) of his deceased Brothers and Sisters. *Pett's Case*, 1 Pr. Wms. 25; *Bowers* v. *Littlewood*, Id. 593. And as we have seen, there must also be some Brother or Sister of the Intestate (1403.) living, to entitle the Nephews and Nieces to take by representation rather than as immediate next of kin, and per stirpes rather than per capita.

That the restriction is also to be understood as if inserted in the St. 1 Jac. 2, c. 17, s. 7, see *Stanley* v. *Stanley*, (4109.) 1 Atk. 453.

are allotted, obliging them if debts be afterwards discovered to refund proportionally. But notwithstanding the first of these provisions, it has been decided that the Shares to be received upon Distribution are vested interests in Equity from the moment of the Intestate's death.

3 P. Wms. 50. n.

(1413.) By s. 4, a saving is made of the Customs of the City of London, the Province of York, and other places. But by St. 1 Jac. 2, c. 17, s. 8, it is explained that no part of the estate which by the Custom of London or York might be claimed by the Administrator himself, merely as such, is to be exempted from distribution. (1414.) These Customs were anciently restrictive of the power of testamentary disposition; but now by several Statutes their operation is confined to cases of intestacy: and their general effect is to give one-third to the Widow, and one-third to the children; or one Moiety to the Widow, if there be no children, or to the children if no widow; leaving the remaining third, or moiety, or (if there be neither Widow nor child of the Intestate) the whole of his effects, to be distributed according to the Statute. (1415.) The Custom of London adheres to the persons of its Freemen, wherever they may reside or their property be situate; but that of the Province of York is confined to persons resident within it at the time of their decease. (1416.) And in general the Domicile, or fixed and principal habitation of the Intestate at that time, is the criterion to de-

See 2 Bl. Comm. 518; Toll. Ex. 388. 400; Harg. Co. Litt. 176. b. n. 5. &c.

Toll. Ex. 391. 402.

Somerville v. Ld. Somerville, 5 V. J. 750.

termine what District or Country shall give the law to the distribution of his personal estate.

(1417.) By St. 14 G. 2, c. 20, s. 9, Estates *per auter vie*, of which there is no Special Occupant, and which have not been devised according to the Statute of Frauds, are directed to "go, be applied and distributed in the same "manner as the Personal Estate of the Testator or Intestate"(*a*). (1418.) Upon which it has been decided, that if there be a Will, not executed according to the Statute of Frauds, but sufficient for the disposal of personal property, the Executor will take the Testator's Estates *per auter vie* (subject to his debts, &c.) as a Trustee for the persons to whom they are given by the Will. And in cases of absolute intestacy the Administrator will of course be a Trustee for the Widow and next of kin. These Estates are accordingly, by St. 36 G. 3, c. 52, s. 20, subjected to the Legacy Duty. (731, &c.) Ripley v. Waterworth, 7 V. J. 425.

(1419.) The personal property of a Feme Covert, who dies in her husband's lifetime, does not in all cases pass to him by the mere right of survivorship. This mode of transmission indeed is confined to such Chattels Real, as whether in possession or expectancy, have been actually vested in her during the coverture. All other things which do not become the ab- (895.)

[(*a*) This is now repealed, but re-enacted, with some extension, by St. 1 Vic. c. 26. See above, 733, n., 1342, n.]

solute property of the Husband in his Wife's lifetime, including mere rights and possibilities of Chattels Real, can vest in him after her death only in the character of Administrator; which is a case omitted in the St. 22 & 23 Car. 2, c. 10. (1420.) But by s. 25 of the Statute of Frauds (29 Car. 2, c. 3), to prevent doubts on this subject, the ancient right of the husband to "demand and have Administration of his Wife's "rights, credits and other personal estate, and "recover and enjoy the same," is confirmed. (1421.) And it has been decided that the Equitable interest accrues to the Husband immediately upon his Wife's death, and is transmissible to his own Executors or Administrators, though he neglect to take out Letters of Administration in his lifetime, and though such Letters be afterwards granted to the next of kin of the Wife; for her Administrator will be a Trustee for the Husband's representatives; who are therefore the most proper persons to be invested with the office. (1422.) But the property cannot be recovered, either at Law or in Equity, until the Administrator of the Wife has been appointed (*a*).

Co. Litt. 46. b. 351. a.

(1401.)

1 P. Wms. 381.

Collins *v.* Doyle. 1 Russ. 135; [Betts *v.* Kimpton, 2 B. & Ad. 273.]

[(*a*) If the wife survives the husband, her chattels real, if not disposed of by him, go to her, and not to his personal representatives. See above, 895. And the same rule holds with respect to the equitable chattels real of the wife. And this power of disposition by the husband, by which he may defeat the wife's right by survivorship, extends, it seems, to any contingent interest in chattels real,

(1423.) Where a Testator, without disposing of his whole personal estate, appoints an Executor; the person so appointed is absolutely entitled at *Law* to the residue which is undisposed of. But if it appear * sufficiently on the face of the Will that it was not the intention of the Testator thus to benefit his Executor, the Courts of Equity will consider him as a Trustee for the next of kin (*a*). (1427.) This

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* (1423. *n.*) See the authorities on the subject in 2 Fonbl. 127, &c. (1424.) It may be sufficient here to state generally, that if a legacy be given to a sole Executor, though not expressly as a reward for his expected services, yet it is sufficient, for the most part, to constitute him a Trustee; (1425.) and so if two or more Executors have equal legacies. But if the legacies be unequal, it is otherwise. (1446.) Parol evidence also may be admitted to rebut or negative the Trust. (506.)

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which may by possibility become vested during the coverture; and that, whether the interest be legal or equitable. (Butl. Co. Litt. 351, a. n. 1; *Doe* v. *Steward*, 1 A. & E. 300; *Donne* v. *Hart*, 2 Russ. & M. 360.)

As to the future interests of the wife in other species of personal property, the husband's assignment of them is ineffectual as against the wife's right by survivorship, which will be preferred to the right of the assignees, whether in bankruptcy or otherwise. (*Mitford* v. *Mitford*, 9 Ves. 87. 99; *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65.) Nor can he, it seems, effectually dispose of a life interest of the wife, beyond the duration of the coverture. (*Stiffe* v. *Everitt*, 1 My. & Cr. 37.)]

[(*a*) And now, by St. 1 W. 4, c. 40, the executors of any person, dying after the 1st September, 1830, shall be deemed, in Courts of Equity, to be trustees *for the person or persons (if any) who would be entitled to the estate under*

14 V. J. 324; 1 Turn. 257; Fitzgerald v. Field, 1 Russ. 416. (1404.1413.) however not being a case of intestacy, but of implied residuary bequest, the peculiar incidents of intestacy, such as the principle of Hotchpot, and the Customs of London and York, are not to be regarded in the distribution (*a*).

(860. 912, &c.) (1428.) Another kind of Trust incident to Chattel Interests in Land has already been slightly mentioned, by which Terms * of years become attendant upon the inheritance. (1429.) Such a Trust, though it is commonly established by a written declaration, will otherwise, if there be no sufficient indication of a contrary intention, be raised by implication from the circumstances which render it convenient. For where the same person has two

See Hayter v. Rod, 1 P. Wms. 360.

(875.) * (1428. *n.*) Not only Terms of years, properly so called, but other Chattel Interests, such as Estates by Elegit, may be attendant on the Inheritance; but these last may now be thought to deserve less consideration, since it has become the practice to take an account of the debt (on the existence of which the estate depends) in a more summary way than formerly.

[See now, 875, n. *a*.]

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the statute of distributions, in respect of any residue not expressly disposed of; unless it shall appear by the will or codicil, that the executors were intended to take such residue beneficially. But the Act is not to prejudice the right of the executor, in cases where there is no person so entitled under the statute of distributions.]

[Wood v. Cox, 1 Keen, 317.]

[(*a*) *Quære,* how the rule is in this respect under the late Act? See the last note; and see the preamble to the Act.]

distinct interests in the same land, the one* Equitable and the other Legal, the one also a Chattel, and the other a Reversionary Inheritance, the rule of analogy requires that they should be consolidated; at least if the case be such that, supposing both interests to be of a Legal kind, the one would necessarily be merged in the other. For otherwise, that which (896.) at Law is only an evanescent accessory would in Equity become the principal; the inheritance, (734. 935. instead of appropriating to itself the immedi- 1423. 1401. ateness of the chattel, would be postponed to it; &c.) and the privileged succession of the heir-at-law would be sacrificed to the claims of Creditors by Simple Contract, of Legatees under an unattested Will, of Executors, or of persons deriving their Title from the Statute of Distribution. (1430.) The same reason is applicable to any number of Terms outstanding in different Trustees for the absolute benefit of the Reversioner; since the several legal Estates, if transferred to him, would all successively merge in the Inheritance or Freehold. But if there

* (1429. *n.*) It most frequently happens that the Legal Estate of Inheritance or Freehold, together with the Equitable Interest in a Term, is vested in one person: but the principle is the same, if the legal owner of a Term for his own absolute benefit happen to be also the Equitable owner of the Fee or Freehold, (*Whitchurch* v. *Whitchurch*, 2 P. Wms. 236,) except that in this case the Term will pass, as Legal Assets, to the Executor or Administrator. (734. 1372.) The term will also be attendant, if both interests vested in the same person be merely Equitable. 3 Swanst. 201.

be a Term or Chattel intervening, in which the Freeholder has no equitable interest, the case becomes somewhat different. Thus if *A.*, being Tenant in Fee Simple, make a Farming Lease for twenty-one years to *B.*, who again demises the land for twenty years to *C.*, with or without a * reservation of Rent, and then *A.* purchases the interest of *C.*, and procures an Assignment of it to be made to a Trustee for himself; it seems that Equity, still following the

Scott v. Fenhoullet, 1 Bro. C. C. 69. & n. by Eden. And see Sugd. Vend. 441; 1 Sand. Us. 294.

(898.) Law, (since in this case there would be no Merger, although the Term had been assigned to *A.* himself,) will regard the Trust of the secondary Term as a part of *A.*'s personal estate. (1431.) If however the original Lease had been made to *B.* as a Trustee, for some purpose which did not exhaust the whole interest, as that of raising or securing an Annuity for some other person, there would have been a
(126. 1360.) kind of resulting Trust of the surplus profits of the land for *A.* the Lessor; and thus, though he could not call in the Term of twenty-one years and cause it to be merged, still it would not be entirely severed from his old dominion; and therefore Equity, having regard to the
1 T. R. 765. legal maxim, which invests the Freeholder with
(302.) a virtual seisin when removed from actual possession by a chattel interest only, and to the

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* (1430. *n.*) It must however be observed that the importance of an attendant Term depends very much upon its being free from rent and other burdens.

partial continuation of the old beneficial ownership and the evident intention of the parties, would it seems allow the twenty years Term to be made attendant on the Inheritance by an express declaration of Trust for that purpose; 1 Bro. C. C. 70. (1432.) and in this case if the creation of the twenty-one years Term, and of the derivative Term of twenty years, and the vesting of the latter in a Trustee for *A.*, or in *A.* himself, had been all parts of one and the same transaction, it may be thought that even without such declaration the two interests of *A.* would be consolidated in Equity.

Baden v. Lord Pembroke, 2 Vern. 52.

(1433.) The equitable Consolidation of which we are here treating is of such a kind, that it cannot be dissolved by any other person, or by any less solemn act than would be sufficient for the creation of a new Term. (1434.) And it may be stated as a general rule, that from the moment when the Term becomes attendant, all dispositions of the ulterior estate take effect in Equity, as if the Term had been merged; since every successive owner has a right to the benefit of the Term to the same extent that he is interested in the Land independently of its existence. (1435.) But this general rule is subject to two exceptions: the first is, that an Assignee of the Term, for valuable consideration, without knowledge or *notice* (actual or presumed) of the Trust in general, (or which is more likely to happen) of some particular disposition of the Land by which the Trust,

Whitchurch v. Whitchurch, 2 P. Wms. 236.

Willoughby v. Willoughby, 1 T. R. 763. But see Nurse v. Yerworth, 3 Swanst. 608.

(1275.)

subsequently to its creation, has been varied, will hold his legal estate subject to no trust but that, (if any,) which he was acquainted with at the time of the Assignment: (1436.) and so a purchaser of the land for valuable consideration, if after the conveyance of the inheritance to him is completed, and his purchase money actually paid, he receive notice of a prior incumbrance, may even then protect himself against it, if he can procure an outstanding Term to be assigned to a Trustee for himself: for in equity, wherever two claimants are equally meritorious, though the elder Title must in general confer the preferable right, yet it will not be allowed to prevail against one of later origin which is supported by the possession of the Legal Estate. (1437.) The second exception has been introduced in favour of alienation, and enables a Purchaser* (for valuable consideration) of the inheritance from a married man, though he have full knowledge of the Wife's right of Dower, yet if in the

1 Sand. Us. 297. 1 Atk. 384; 2 Atk. 630; 3 Atk. 304.

[See 2 V. c. 11, s. 5; above, 878, n *]

Mole v. Smith, Jac. 490.

(349, &c.)

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* (1438.) The Assignees of a Bankrupt's Estate are not considered as Purchasers for valuable consideration, but rather as representatives of the Bankrupt; unless therefore the Estate be sold and an assignment of the Term made for the benefit of the Purchaser, (or a Suit in Equity commenced for compelling such Assignment,) in the lifetime of the Bankrupt, his Widow will be entitled to the full benefit of her Dower, notwithstanding any Assignment made with a view to protect the Assignees. *Squire* v. *Compton*, 9 Vin. 227.

Husband's lifetime he have procured a Term, created before the Marriage, to be assigned to a Trustee for him, (or have commenced a suit in consequence of which such an Assignment is afterwards compulsorily made,) to set up the Term against the Widow; which, if it be of sufficient duration and free from Rent, by postponing her claim will render it nugatory. [See 349, n., 351, n.]

(1439.) If Land be conveyed or devised upon Trust for Sale, with an apparent intention that it should at all events be converted into money as a more eligible kind of property, the Equitable Interest in it, while still unsold, is considered as Personal Estate: for Equity regards that which ought to be done, as done already. (1440.) So also a mere Contract of Sale (if it be effectual) is considered as instantly substituting the purchase money for the land. Nor does it appear that this consequence will be varied, though the performance of the Contract be made dependant on the option of the purchaser, provided that he afterwards causes it to be effected. (1441.) But if a Trust for sale be confined * to a special purpose (as for payment

1 Sand. Us. 300.

Sugd. Vend. 157.

7 V. J. 435.

* (1441. *n.*) Of this kind is the Trust imposed upon the Assignees of a Bankrupt, to sell the estate for the benefit of Creditors; and therefore if part remain unsold after the Bankrupt's death, and there be a surplus after payment of all his debts, this will belong to his heir. 1 Atk. 81: *Banks* v. *Scott*, 5 Madd. 493. So where an estate is decreed by a Court of Equity to be sold for satisfaction of a debt, and the owner is not capable of consenting to the Decree. *Mondey* v. *Mondey*, 1 V. & B. 223.

ofa debt or the like) which either does not exhaust the whole interest, or afterwards ceases, or is satisfied by other means; no such immediate alteration in the nature of the property will be considered to have taken place.

(1442.) On the other hand also, Money directed to be laid out in Land is for all purposes considered as the Real Estate of those by whom its produce is to be enjoyed; until some person, or all the persons (if more than one,) who, if the land were actually purchased, would be entitled in Equity absolutely to dispose of it, either receive the money, or sufficiently show their intention that it shall be considered as personalty. (1443.) If a Feme Covert be entitled to the Fee Simple in this kind of Equitable Hereditament, she may dispose of it through the medium of a personal examination in the Court of Chancery; which in this case is equivalent to a Fine(*a*): (1444.) and if there be an Entail, a substitute for a Recovery, in the form of a Petition by all necessary parties to the Court of Chancery or Exchequer, is provided by St. 7 G. 4, c. 45, which repeals a former Act for the same purpose(*b*). (1445.) It is obvious that,

1 Sand. Us. 298.

1 Sand. Us. 302. 436.

[(*a*) The power of disposition by married women with their husbands' concurrence, given by s. 77 of St. 3 & 4 W. 4, c. 74, extends to "money subject to be invested in the purchase of lands."]

[66, 2 n. *a*.]

[(*b*) This Act is repealed, but without reviving the former Act, by s. 70 of St. 3 & 4 W. 4, c. 74; and s. 71 enacts, that lands of any tenure to be sold, where the pur-

on the principles already stated, a binding Contract for the purchase of land must communicate to the intended Purchase Money, while it remains in the hands of the Purchaser and is not intercepted by superior claims, the character of Realty. And therefore if he die before his purchase be completed, his Heir or Devisee may require the money to be paid out of his personal Assets. But this will not be the case Broome v. Monck, 10 V. J. 597.

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chase money is to be invested in the purchase of lands to be settled, and also money subject to be invested in the purchase of lands to be settled, shall, for all the purposes of the Act, be treated as the lands to be purchased; and all the previous clauses of the Act shall apply to the lands to be sold, except where they are copyhold, in the same manner as if the lands to be purchased were directed to be freehold; and shall apply to the land to be sold, where they are copyhold, in the same manner as if the lands to be purchased were directed to be copyhold; and shall apply to money subject to be invested as aforesaid, in the same manner as if such money were directed to be laid out in the purchase of freehold lands;—except that leaseholds for years or money, so circumstanced as aforesaid, shall be treated as personal estate, and shall, except in cases of bankruptcy, be disposed of by an assignment by deed, inrolled in Chancery within six calendar months after the execution, and shall, in cases of bankruptcy, be disposed of by the Commissioners, in the same manner as the Act requires in regard to lands not copyhold *.] [682, n., 691, n., 706, n., 711, n., 1299, n.] [711, n.]

[* S. 74 contains a provision, (which might with more propriety, perhaps, have been noticed above, (682, n.)) that every deed of disposition under the Act shall, though inrolled as required by the Act, be void against any person claiming for valuable consideration, under any subsequent deed inrolled under the Act, if such subsequent deed be first inrolled.]

if the state of the Title be such, that the Contract, in the contemplation of Equity, is not binding upon both parties.

(1446.) The Trusts hitherto principally considered are general in their nature; some of them so nearly resembling the ancient Use, that (1360.) they might not unfitly be abolished in like manner; others imposing certain Duties on the Trustees, and therefore convenient to be retained. Of Special Trusts there must necessarily be an infinite variety; but two or three classes of them deserve particular notice.

(1447.) Trusts for charitable purposes are commonly accompanied with some discretionary powers, which however will be restrained within due bounds by the Court of Chancery. Thus, improvident Leases made by the Trustees will be set aside. And yet it seems that even absolute alienations, if beneficial to the Charity, may be supported. And length of time, though not a bar, is an obstacle in the way of setting aside such contracts. But the Statutes of Limitation do not here afford any criterion.

1 Turn. 216.

Atty.-Genl. v. Warren, 2 Swanst. 291. But see Jac. 412.

Atty.-Genl. v. Mayor, &c. of Exeter, Jac. 443.

(1378, &c.) (1448.) If the Trust Property produce a surplus, beyond what is required for the specified objects of the Charity, the Court of Chancery will direct its application to some similar purpose.

2 Fonbl. 222.

(775, &c.) (1449.) The nature of a Trust for preserving Contingent Remainders has been already explained. The violation of this Trust by the Trustee's concurrence with the Tenant for life

Fearne, C. R. 326, &c.

in destroying the Remainders will always subject him to the liability of making compensation to the injured parties. But there are some cases in which, a Chattel Interest only having been given to the Father, the Trustees have been suffered, or even directed by the Court, to join with the Tenant in Tail in Remainder in a Recovery by which some Remainders, still under Contingency, have been destroyed. It is difficult to lay down any general rule on this subject; and the inconvenience of making the Parent only Tenant for years is now so generally acknowledged, that Settlements are seldom so framed as to subject the Trustees to the necessity, either of assuming a discretionary power in this respect, or of applying to a Court of Equity for direction.

(1450.) Trusts for Accumulation of the Rents and Profits of Land might formerly be made commensurate in duration with the utmost period allowed for the suspension of any (784.)
Springing Use or Executory Devise by which an estate in fee simple could be defeated. But this liberty having in one instance been strangely abused, certain limits were prescribed to it by St. 39 & 40 G. 3, c. 98, which prohibits the Settlement or Disposition of any "Real or Personal Property so and in such "manner that the rents, issues, profits, or pro-"duce thereof, shall be wholly or partially ac-"cumulated, for any longer term than the life "or lives of any such Grantor or Grantors,

See Butl. Fearne, C. R. 436. n. 538. n.

" Settler or Settlers; or the Term of twenty-
" one years from the death of any such Gran-
" tor, Settler, Devisor, or Testator, or during
" the minority or respective minorities of any
" person or persons who shall be living or in
" *ventre sa mère* at the time of the death of
" such Grantor, Devisor, or Testator; or dur-
" ing the minority or respective minorities
" only of any person or persons who under the
" Uses or Trusts of the Deed, Surrender, Will,
" or other Assurances directing such Accumu-
" lations, would for the time being, if of full
" age, be entitled unto the rents, issues and
" profits, or the interest, dividends or annual
" produce so directed to be accumulated.
" And in every case where any Accumulation
" shall be directed otherwise than as afore-
" said, such direction shall be null and void,
" and the rents, issues, profits and produce
" of such property so directed to be accumu-
" lated shall, so long * as the same shall be

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* (1451.) The Statute, it will be observed, makes the Trust for Accumulation void so far only as it exceeds the limits here prescribed; see *Griffiths* v. *Vere*, 9 V. J. 127;) but if it exceed the limit fixed by the general principle of Law for avoiding perpetuities, it must fail altogether; and this is the case where the rents and profits of Real Estate are directed to be accumulated during the minority of *every* future Tenant in Tail, so that the fund shall not vest
(1399.) absolutely in him unless he attain the age of twenty-one. For the rents, when they have become due, are personal property; and though the surplus, not required for the Infant's maintenance, ought to be invested for the purpose

" directed to be accumulated contrary to the " provisions of this Act, go to and be received " by such person or persons as would have " been entitled thereto if such Accumulation " had not been directed." (1452.) But by s. 2, the Act does not extend " to any provi- " sion for payment of debts of any Grantor, " Settlor, or Devisor, or other person or per- " sons, or to any provision for raising Portions " for any Child or Children of any Grantor, " Settlor, or Devisor, or any Child or Children " of any person taking any interest under any " such Conveyance, Settlement or Devise, or " to any direction touching the produce of " Timber or Wood upon any Lands or Tene- " ments."

[Eyre *v.* Marsden, 2 Keen, 564.]

[Eyre *v.* Marsden, *ubi supra*]

(1453.) Wherever Real Property is conveyed or devised upon any Trust which does not exhaust the whole interest, and there is no indication of an intention that the Trustee should be benefited, a Resulting Trust arises for the Grantor, or for the Devisor's heir-at-law. But the mere want of a Consideration where there is no appearance of any Trust being intended, does not of itself raise a

1 Sand. Us. 327. 334.

(126. 1431.)

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of accumulation, yet, after the expiration of the period, during which, as personalty, (and therefore independently of the existence of an Estate Tail,) it is capable of suspension, this accumulation must be for the Infant's own benefit or that of his personal representatives. *Ld. Southampton* v. *M. of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Swanst. 432.

Resulting Trust. (1454.) In Testamentary Settlements of Real Estate, whatever remains undisposed of, whether at Law or in Equity, descends to the heir; who therefore (unless there be an immediate residuary Devise) is entitled to the rents and profits while the particular dispositions of the Will are in suspense. (1455.) But with respect to Personal property another rule prevails; for if it be so bequeathed as not to vest in any person immediately, the produce of it in the meantime is to be accumulated for the benefit of the person ultimately entitled. (1456.) And therefore if Real and Personal property be devised promiscuously and in general terms, to vest at a future time, the mixed fund will, to satisfy the Testator's intention, acquire a uniform character in this respect, and the intermediate profits of the land will be included in the Executory Devise. (1457.) But where Real Estate is directed to be sold, and the whole or any part of the produce happens in the event to be undisposed of, the Trust for Sale will not defeat the claim of the heir-at-law (*a*); though if a Sale be necessary for effecting the remaining purposes of the Will, the interest thus resulting will vest in the heir as personal estate.

Fearne, C. R. 537.

Fearne, C. R. 545.

Genery *v.* Fitzgerald, Jac. 468.

Ackroyd *v.* Smithson, 1 Bro. C. C. 503. [Phillips *v.* Phillips, 1 My. & K. 649; Jessop *v.* Watson, ib. 665; Cooke *v.* Stationer's Co. 3 My. & K. 362.] Wright *v.* Wright, 16 V. J. 188.

(1441.)

[(*a*) See however, St. 1 Vict. c. 26, s. 25; above, 279, n.]

Sect. 2.—*Of Equities of Redemption, and Equitable Charges.*

(1458.) A Mortgage though forfeited at Law, and though the Mortgagee be n ipossession of the land, continues redeemable in Equity, so long as the relation of debtor and creditor appears to subsist between the parties, and for twenty years after the last acknowledgment of that relation by the Mortgagee (*a*); unless, upon his application, the right be previously *foreclosed* by a Decree of the Court. And this Right of Redemption constitutes an Equitable Estate, capable of alienation, and having in general all the incidents of a Trust. (1459.) There is not however any Trust, in the

(24. 825.)

[See Harrison *v.* Hollis, 1 S. & S. 471.]

Coote Mortg. 41.

2 J. & W. 182. 190; see also Jac. 513.

[(*a*) And now, by St. 3 & 4 W. 4, c. 27, s. 28, (amended by St. 1 Vict. c. 28,) where the mortgagee is in possession, the mortgagor shall not bring a suit to redeem, but within 20 years next after the time of obtaining possession, or next after the last acknowledgment of the mortgagor's title or right of redemption, given to him or his agent in writing signed by the mortgagee or his agent: and where there are more than one mortgagor, an acknowledgment given to one shall be as effectual as if given to all; but where there are more than one mortgagee, the acknowledgment shall be effectual only against the party or parties signing it, and those claiming under or after him or them; and if such party or parties be entitled to a divided part of the land, but not to any ascertained part of the mortgage money, the mortgage may be redeemed on payment with interest of a part of such mortgage money, proportioned to the value of such divided part of the land.]

fullest sense of the word, subsisting between the Mortgagor and Mortgagee, until payment or tender of the money; except that the Mortgagee, if in possession, or in receipt of the rents, is accountable for all his surplus profits. (1460.) Such possession* may be obtained at any time after forfeiture of the Condition, by Ejectment, without any notice to quit given to the Mortgagor, or to any person deriving Title from him (*a*) since the Mortgage; and a Lessee by prior Title is bound, upon notice, to pay his rent to the Mortgagee (*b*). (1461.) The Mortgagee seems also to be entitled to direct the conveyance or assignment, for his benefit, of any legal estate in the land, attendant on the inheritance, or otherwise held in Trust for the Mortgagor, without the concurrence of the Latter. (1462.) But on the other hand, the Mortgagor in general would not be prejudiced

Coote Mortg. 368.

Keech *v.* Hall, Doug. 21; [Doe *v.* Maisey, 8 B. & C. 767; Doe *v.* Giles, 5 Bing. 421.]

Moss *v.* Gallimore, Doug. 266.

(1098. 1100.) Willoughby *v.* Willoughby, 1 T. R. 763.

Coote Mortg. 43; Bradwell *v.* Catchpole, 3 Swanst. 78. n.

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* (1460, *n.*) If an Advowson be the subject of Mortgage, the Mortgagee cannot, until Foreclosure, have any benefit of the right of Presentation, but is bound to present the Mortgagor's nominee. Coote Mortg. 59. 233.

[(*a*) As to what will amount to a recognition of the tenancy by the mortgagee, so as to preclude him from treating the tenant as a trespasser, see *Doe* v. *Hales*, 7 Bing. 322; *Doe* v. *Cadwallader*, 2 B. & Ad. 473; *Evans* v. *Elliott*, 9 A. & E. 342.]

[(*b*) And so too is the Lessee under a lease made by the mortgagor in possession subsequent to the mortgage. See *Pope* v. *Biggs*, 9 B. & C. 245.]

by any act of the Mortgagee, to which he is not a party. The land, however disposed of by the Mortgagee, will still be subject to redemption: and it seems doubtful whether we can except even the extreme case of a purchase (1375.)
from the Mortgagee, being in possession, by a person ignorant of the Mortgage. (1463.) But it is clear that a mere Assignee of the benefit of the Mortgage Debt, with the land as a security, is bound by all previous transactions between the Mortgagor and Mortgagee; and if the debt have been reduced before the Assignment, though without his knowledge, must acquiesce. (1464.) And upon payment of the principal debt and all arrears of interest, and the costs (if any) which have been incurred in order to compel payment, or whatever else may constitute the balance of the account, the Mortgagee becomes in every respect a Trustee, (1459.)
and is bound to re-convey the land to the person who can * prove an Equitable Title to it.

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* (1464. *n.*) He who claims the benefit of redemption must deduce his Title from the Mortgagor (*a*), and verify it

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[(*a*) Where tenant in tail mortgages, his disposition under the late Act shall, to the extent of the estate created, [3 & 4 W 4, c. 74.]
be a bar, at law and in equity, to all against whom the Act authorizes such disposition to be made, notwithstanding any intention expressed or implied in the deed to the contrary: provided, that if the estate so created be only *pur autre vie*, or for years, or if an interest, charge, lien, or incumbrance shall be created without any estate for secur-

(1458.) Coote Mortg. 46; 2 J. & W. 177. (1468.) There seems no reason to doubt, that the benefit of future redemption constitutes

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at his own expense. *James* v. *Biou*, 3 Swanst. 234. (1465.) What expressions in the mortgage deed are sufficient to transfer the Equity of Redemption from the original owner of the estate to another party, particularly as [Ruscombe *v.* Hare, 2 Bligh, 192; S. C. 6 Dow, 1; Reeve *v.* Hicks, 2 S. & S. 403.] between Husband and Wife, see But. Co. Litt. 208, a. n. 1; 5 Bac. Ab. 33; *Jackson* v. *Parker*, Amb. 687; *Innes* v. *Jackson*, 16 V. J. 356; [see S. C. reversed, *Jackson* v. *Innes*, 1 Bligh. 104.] If the Wife join with her Husband in a Fine in order to let in a Mortgage against her Jointure or right of Dower, she will still retain a similar interest in the Equity of Redemption (*b*). (1466.) And so if the Husband mortgage his estate, before marriage, for a Term of years only; for she is legally dowable of the Reversion, subject to the Term. But it would

last case, the Husband, after marriage,

Debt, though to the prejudice of his

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ing it, the disposition shall in equity be a bar only so far as necessary to give full effect to the mortgage, or to the interest, charge, lien, or incumbrance, notwithstanding any intention expressed or implied in the deed to the contrary. (s. 21.)]

[(*b*) It seems that the same general principle is to be applied, whether the wife joins in the conveyance because the estate belongs to her, or, because she has a right of dower out of it. See 1 Bligh, 26. As to the question, however, of the wife's right to dower out of the Equity of redemption, after having concurred in a fine to the mortgagee, see opinions on both sides, 4 Jarm. Byth. 174, 175.

[3 & 4 W. 4, c. 105.] Where the case comes within the late Dower Act, (*i. e.* where the marriage was since the 1st of January, 1834,) the mortgage has priority over the wife's dower, without the necessity for her concurrence in the deed; (s. 5;) and she will be entitled to dower in the Equity of redemption, unless barred by the husband's declaration or otherwise under the Act. (s. 6, &c.)]

an Equitable Estate in the Land from the moment of making the Mortgage, although it be not yet forfeited; for the Equity of Redemption is regarded, in Courts of Equity, as a continuation of the old ownership; the Mortgagee holding the Estate only as a pledge for (267.)
the money, in the re-payment of which he is principally interested. (1469.) Hence a Mortgage in fee simple does not absolutely destroy the operation of a previous Devise of the same land; for the Equity of Redemption will still pass according to the Will*.

Wife: since, as we have seen, he might cause the entire (1437.)
interest in the Term to be assigned to a purchaser. (1467.)
Where the Mortgage, made before marriage, is in Fee, no (1362.1363.)
right of Dower attaches on the Husband's Equity of Redemption (*a*); which, however, if it belonged to the Wife, would, like a Trust, be subjected to Curtesy. *Casburne* v. *Inglis*, 2 J. & W. 194.

* (1469. *n.*) But if the heir at Law, or a stranger, take possession of the land and hold it, subject to the Mortgage, for twenty years, the Devisee (not being an infant or otherwise disabled) is absolutely barred. This was the
point actually decided in the case of *M. of Cholmondeley* (1479.)
v. *Lord Clinton*, in the House of Lords; though the principle of the decision extends further. See 2 J. & W. 1. 139; 1 Turn. 107 (*b*).

[(*a*) But if the marriage took place since the 1st of January, 1834, the right of dower would attach on the Equity of redemption; (see 349, n.;) unless prevented by some of the means whereby it is now barrable. (See 351, n.]

[(*b*) And see now, St. 3 & 4 W. 4, c. 27, s. 24, &c., above, 1379, n.]

(1470.) It may seem at first sight that the Heir or Devisee, when he becomes entitled to the Equity of Redemption, must take upon himself the debt. But this is far from being the case universally; for, by the general rule of Law, every debt to which the deceased was personally liable is payable in the first instance out of his personal estate; nor does the additional security of a Mortgage in any degree diminish the force of the personal obligation incurred by a borrower to repay the loan, whether that obligation be evidenced (as is usual) by a Bond or Covenant, or not (*a*). (1471.) But the Purchaser of an Equity of Redemption, however obliged to indemnify the Vendor against the Debt, yet is not personally bound to the Mortgagee, with whom he has not contracted; and therefore the Heir or Devisee of such a Purchaser, though himself also not personally liable, must take the land subject to the incumbrance, which he cannot call upon any other person to discharge unless there be some special provision for the purpose. (1472.) And even if the Purchaser had entered into a Covenant with the Mortgagee for payment of the debt, but had shown no further intention of taking it upon himself, Equity it seems

Butl. Co. Litt. 208. a. n. 1.

Coote Mortg. 491.

[(*a*) For cases in which the heir has been held personally liable, see *Lushington* v. *Sewell,* 1 Sim. 435; *Barham* v. *E. of Thanet,* 3 M. & K. 607. See also, *E. of Ilchester* v. *E. of Carnarvon,* 1 Beav. 209,]

would still consider the Land as the primary fund for that purpose, and not suffer his personal Assets to be applied for its exoneration. (1473.) But where the Debt was originally contracted by the deceased, Equity, following the Law, will cause it to be discharged by his Executors or Administrators, unless there be some special reason to the contrary. Such a reason however may be afforded by a clear intention shown in his Will, not merely to continue the charge upon the Land in Mortgage, or to impose it upon other Real Estate, (which may be explained away, by construing the expressions as a mere acknowledgment of the debt, or supplementary provision for its discharge,) but also to exempt the Personal Estate from its ordinary liability: (1474.) and so likewise if there be a deficiency of other funds for the payment of general creditors, or even of legatees, the Mortgagee, though not debarred from his legal remedy, will not be suffered to defeat their claims; but out of whatever part of the Assets he may receive payment, his old security will be kept up and enforced for the benefit of those parties who would otherwise be disappointed: and thus in effect only the ultimate residue of the personal estate becomes applicable to the exoneration of the land (*a*).

Coote Mortg. 462. 482.

[Rhodes *v.* Rudge, 1 Sim. 79; Driver *v.* Ferrand, 1 R. & M. 681; Blount *v.* Hipkins, 7 Sim. 43; Bickham *v.* Cruttwell, 3 M. & C. 763.]

Coote Mortg. 483.

[(*a*) In a late case, Sir John Leach held, that if the mortgaged lands be insufficient to pay the mortgage debt, the mortgagee can prove against the other assets for the de-

Coote Mort. 484; Serle v. St. Eloy, 2 P. W. 386.

(1475.) Where the personal Assets fail, or are exempted from the Mortgage Debt, a Devisee of the Equity of Redemption may have recourse, for its exoneration, to other lands devised for the express purpose of constituting a fund for payment of debts; or in the next
(734.) place, (if the Mortgage be attended with personal securities which bind the heir in respect
[And see 1508, n.] of Assets in his hands,) to lands undisposed of by the Will; or lastly, to lands devised to an individual for his benefit, but charged with the payment of the Testator's debts. (1476.) From the order thus established in the case of a Devisee of the Equity of Redemption, it is evident that if it descend to the heir, he cannot claim exoneration out of any fund but the personal estate, or lands devised in trust for payment of debts. (1477.) The benefit of the Mortgage Debt (as indeed of all other debts) is assignable in Equity; the original Creditor being converted by the Assignment into a Trustee of such Legal Remedies as the Law
366.) (except in Bankruptcy and some other cases specially provided for by Statute,) does not allow to be more directly transferred; while the Land subject to Redemption, (which is the principal security,) may here in the fullest

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ficiency only; and that this is the general rule in Equity, and not merely in Bankruptcy. *Greenwood* v. *Taylor*, 1 Russ. & M. 185. This decision, however, has been questioned by Cottenham, L. C.; *Mason* v. *Bogg*, 2 My. & C. 443.]

manner be legally vested in the Assignee. To him therefore, as standing in the place of the original Mortgagee, the money must be paid. (1478.) But if the original or substituted Mortgagee happen to die, the debt is due to his Executors or Administrators: for though the Land, supposing it to be mortgaged in Fee, will descend to his heir, or pass by a general description to devisees, they will only take it as Trustees of the Security for his Personal Representatives. (1479.) If the Mortgage were originally made, or afterwards assigned, to more persons than one, they will not in Equity be considered as Joint-tenants, so that the whole benefit of the debt shall go to the survivor, but as Tenants in Common. (1480.) And therefore where a Mortgage is made to Trustees, who do not appear in that character on the face of the Deed, (as it is desirable they should not, lest the Title to the Land be incumbered with Notice of their Trust,) it is usual to insert a Clause providing against the application of this rule of Equity to their case.

Butl. Co. Litt. 208. a. n. 1.

(611.)

Coote Mortg. 532.

(1481.) We have hitherto supposed only one Mortgage to have been made of the Land in question; but it not unfrequently happens that the Equity of Redemption is mortgaged to a second lender, and the still remaining Equity to a third. To prevent the abuses attending this practice, by St. 4 & 5 W. & M. c. 16, the making of any subsequent Mortgage, without giving notice to the intended Mortgagee, by writ-

ing under the Mortgagor's hand, of every Mortgage already made by him of the same land, is punished by forfeiture of the Equity of Redemption to the person thus defrauded: and the neglect to give previous notice in like manner of any prior Judgment, Statute, or Recognizance incurred by him, subjects the Mortgagor to the like penalty, unless he pay off the Judgment, &c. within six months after a requisition for that purpose made by the Mortgagee. (1482.) It is obvious however that this provision can be of no service where relief is most wanted, that is, where the amount of the incumbrances exceeds the value of the Land; nor does it tend in any great degree to prevent such cases from arising. The most
(235. 627,) effectual preventive is Registration, which is confined to particular districts. But another
(860. 1428.) is often afforded by the existence of a Term attendant on the Inheritance: for this, (being for the most part necessarily discovered in the investigation of the Title,) a prudent Mortgagee will require to be assigned for his benefit; in consequence of which the Trustee in whom it is vested, if he be informed of any prior incumbrance, will discover it, as the ground of his refusal to make the Assignment; or if there be an incumbrance of which he is ignorant, the new Mortgagee thus getting the
(1435. 1436.) Legal Estate of the Term into his power, will be preferred in Equity as well as at Law to the prior incumbrancer; who may be thought

to be justly punished for his negligence, in not either procuring an Assignment of the Term to a Trustee of his own nomination, or at least giving notice of his right to the existing Trustee. (1483.) There may be cases however wher an Attendant Term, instead of promoting discovery and open dealing, may be found subservient to purposes of fraud. For, as it is always thought advisable, with a view to expedition in bringing Ejectments against misbehaving Lessees, or other wrongful occupants, to keep the documents relating to the Term distinct, as far as is practicable, from those which directly concern the Inheritance; it is possible that a good apparent title in Fee Simple m y be shewn while the creation and all subsequent Assignments of an outstanding Term are suppressed; and thus a Mortgagee with a seemingly good Title may be supplanted by one who coming after him, and ignorant of his right, obtains a more perfect Assurance. (1484.) This however cannot easily happen, unless the first Mortgagee have neglected to possess himself of the Title Deeds of the inheritance which have been disclosed to him; and therefore such neglect, if there be no circumstance to justify it, may cause him, as an accessary to fraud, to be postponed in Equity to a subsequent Mortgagee, even though the latter should not have the advantage of possessing the Legal Estate. (1485.) But though upon a regular Mortgage, as upon a Purchase, it is

1 Fonbl. Eq. 164, &c.; Coote Mortg. 427.

usual to investigate the Title, and to take all possible precautions, there are other occasions on which Equitable Estates or Charges are often more hastily created; and it is principally to these that the doctrines of Equity relating to the order in which incumbrances are to be satisfied have their practical application. The main principle of these doctrines has already been stated, *viz.* that, of several Equities equally valid in other respects, if those which have the priority in point of time are not made predominant by notice, (afforded in time to prevent the completion of the subsequent contract,) the advantage of possessing the legal estate shall outweigh that of mere seniority. (1486.) Hence is derived the right of *tacking* one debt or charge to another, which may be exercised by a Legal Mortgagee to the prejudice of all subsequent incumbrancers or purchasers with whose claims he is unacquainted; but the new or additional debt, if it be not expressly charged upon the same Land by writing, must at least be attached to it by the general lien of a Statute or Judgment, and not merely secured by a Bond or other personal engagement. (1487.) And a third incumbrancer, upon discovery of the second, may obtain a priority over him by buying-in the interest of the first, though it be no more than a Judgment; for whatever confers a Legal Estate, will, to the full extent of that estate, as available in Courts of Law, be allowed its advantage in Equity. But it is ne-

Brace *v.* Duchess of Marlborough, 2 P. W. 491; Coote Mortg. 417.

(1436.)

(869. 875. 885.) Coote Mortg. 394.

(1428. *n.*)

cessary for this purpose that the third incumbrancer should originally have obtained some specific lien on the land, and not a mere Statute or Judgment in his own right.

(1488.) If, at any time after the Mortgage has become forfeited at Law, the person entitled to redeem make a tender of the money, and the Mortgagee refuse to accept it, he will not only be compelled by a Court of Equity to re-convey the estate on receiving full payment of principal, interest, and costs, but, provided the tender were made in pursuance of a notice for the purpose given six calendar months before, from the moment of its being made the computation of interest will cease. (1489.) On the other hand, the Mortgagee may demand his money when he will, and if it be not paid, may call upon the Court to foreclose the Equity of Redemption, and thus convert the Mortgage into an absolute Purchase. (1490.) If indeed the person entitled to redeem happen to be an infant, a Decree will be made for Sale instead of Foreclosure, that he may not lose the benefit of any surplus in the value of the estate. (1491.) A power of Sale is also not unfrequently inserted in Mortgages; but the object of this is rather to give the Mortgagee the option of an additional remedy, than to secure any benefit to the Mortgagor, who, if the debt be sufficiently below the value of the land, may commonly procure some person to advance it for him upon receiving a transfer of the security. When land is con-

5 Bac. Ab. 111; Coote Mortg. 450.

Coote Mortg. 510. 523.

Coote Mortg. 128.

Clay v. Willis, 1 B. & C. 264.

veyed to Trustees that it may be sold for pay-
(1453.) ment of a debt, the resulting Trust for the Grantor much resembles an Equity of Redemp-
(461.) tion; and we have seen that the Deed requires a Mortgage Stamp.

(1492.) The Rate of interest which is payable after forfeiture of the Legal Condition, is the same with that stipulated in the Deed for its performance: and if an Agreement be inserted, that upon delay of payment this Rate shall be
1 Fonbl. 398. increased, (though still within the limit of five
[And see Davis v. Thomas, 1 R. & M. 506.] per cent.) this penalty cannot, it seems, be strictly enforced in Equity. And yet if a higher rate of interest be originally fixed, but made reducible on prompt payment, (which is only the same thing in other words,) the terms of reduction must be complied with, or the higher interest paid. (1493.) When interest is in arrear, the Mortgagor may agree to add it, as
Coote Mortg. 438. a new debt or further charge, to the principal; but any previous arrangement for this purpose
(231.) seems liable to the penalties of Usury; as would also be an Agreement that the Mortgagee should
(1459.) take the profits of the land without accounting for them. (1494.) With respect to this last point indeed a distinction is sometimes made in
Coote Mortg. 207. favour of what is called a Welch Mortgage, where land is conveyed subject to a condition for redemption at any future time, upon payment of the principal only, the rents and profits being received in the mean time in lieu of in-
Howell v. Price, Pre. Cha. 423. terest. But this is evidently no other than a

Purchase, with a right of repurchase reserved; by which no debt is created on the one side, and therefore the responsibility of a depositary is not incurred on the other. (1495.) A more usual kind of Welch Mortgage is, where the Conveyance is made subject to a Condition for defeating the Estate as soon as the Principal and Interest shall be satisfied out of the rents and profits of the land; this has been compared to a Tenancy by Elegit; but it seems to differ no otherwise from the ordinary case of a Mortgagee in possession, than as the land is the only security for the debt, and the Mortgagor has no right to redeem by tender of the money before the period of satisfaction, measured by the annual value of the land, has expired. Here therefore the Mortgagee is of course obliged to render an account of his profits; but it seems that if this be neglected, and twenty years have elapsed from the time when the debt had actually become satisfied, the right of redemption will be barred.

Yates v. Hambly, 2 Atk. 360; Fenwick v. Reed, 1 Meriv. 114.

(873.)

(1459.)

[See 1458, n.]

(1496.) At Law, money may be charged on land either indirectly by Judgment, Statute or Recognizance, or directly by Mortgage, or creation of a Rent. And of the two direct modes last mentioned, the one requires at least a partial alienation of the land, while the other is periodical in its nature, and attaches rather upon the annual profits or casual contents of the Tenement, than upon its very substance. But in Equity, by whatever means a Trust may

(868, &c.)

(1102, &c.)

7 V. J. 323. be created, a Charge may also be made upon the whole body of the land; and for this purpose no change of ownership or estate is requisite. (1497.) Of this kind may sometimes be the Charges of Children's Portions made by Marriage Settlements; though they are usually provided for by a Term vested in Trustees, which affords the additional security of a Legal Estate, to be occupied, mortgaged, or even sold, (as circumstances may require,) for raising the sums proposed. (1498.) In all accurate Settlements, care is taken to ascertain the time when the Portion of each Child shall become vested, and also when it shall be payable; and in ordinary cases it is usual to fix the first period at the age of twenty-one for males, and at that age or a previous marriage with consent of parents or guardians for females; while the payment of the Portion is postponed, if it happen to vest in the lifetime of either parent who is Tenant for life under the Settlement, until that Parent's death; and until some one Portion has become payable, of course no money is to be raised. (1499.) Where no such precaution has been taken, it seems that, whether the Settlement be by Deed or Will, the Portion vests in the child upon its birth, and, if it die under age, will become payable to its personal representative: but if a time of payment only be fixed, that will also be the time for the portion to vest; and if the child die before that time, the money will not be raised.

Coote Mortg. 136.

E. Rivers v. E. Derby, 2 Vern. 72.

Poulet v. Poulet, 1 Vern. 321; 2 Ventr. 366; Smith v. Smith, 2 Vern. 93.

(1500.) Generally also, whenever the Portion becomes payable it must be raised, though in the lifetime of a Parent who is Tenant for life, if there be any Term which is directed to be mortgaged or sold for the purpose, and no intention of postponement appear; though as the Term is commonly limited in remainder, to commence after the determination of the life estates, this rule is attended with great inconvenience and detriment to the inheritance. Coote Mortg. 137. 144.

(1501.) Charges made by Will, besides those which as Portions for Children may form part of a Testamentary Settlement of the land, are of various kinds. For payment of debts, the land is often devised to Trustees to be sold; (887. 973.) which includes (*a*) a power of mortgaging it, if that be thought more eligible, for the same purpose. Coote Mortg. 185. (1502.) In these cases, though the same persons should be both Trustees and Executors, still the produce of the Real Estate is to be administered by them or their representatives in the former capacity only, and not as Legal but as Equitable Assets; and therefore [1372.] upon the death and intestacy of the last surviving Trustee, no part of this fund will be allowed to pass into the hands of an Adminis- Clay *v.* Willis, 1 B. & C. 364.

[(*a*) This is not a general rule, but applies only, it seems, where the intention is to preserve the estate. The intention of the parties and the nature of the case may render it apparent that a conversion out and out *only*, and not a mortgage, is within the authority. See 1 Sugd. Pow. 538; *Holdenby* v. *Spofforth*, 1 Beav. 390.]

(967. 970.) trator *de bonis non* of the Testator. (1503.) A mere Charge upon land for the same purpose also comes within the exception in the Statute of Fraudulent Devises, and constitutes Equitable Assets. (1504.) Such a Charge enables a Court of Equity to order a Sale or Mortgage of the estate in which the heir or devisee will be compelled to join. (1505.) If, however, the provision for payment of the debts be expressly confined to the application of the *yearly* rents and profits to that object, it cannot be extended to authorize a sale; though in general the words "rents and profits," in trusts for raising money out of land, whether created by deed or will, if not restricted by some expression showing that the produce is to be taken annually as it arises, will carry with them an absolute power of disposition (*a*). (1506.) These Charges of Debts upon Land are favoured in Equity, as acts of justice in the Testator; and therefore if he merely commence his Will with a direction that his debts shall in the first place be paid (*b*), this is held to amount to a Charge on

Bailey v. Ekins, 7 V. J. 319. (887.)

Coote Mortg. 190.

Coote Mortg. 188; 1 Sand. Us. 249.

Ivy v. Gilbert, Pre. Ch. 583; Coote Mortg. 167.

Coote Mortg. 469.

[(*a*) It is a question of intention, to be collected from the context of the will, or from the purposes to which the money is to be applied. By Sir J. Leach, M. R., in *Wilson* v. *Halliley*, 1 Russ. & M. 590.]

[(*b*) This rule does not apply where the testator has appropriated a specific fund for payment of his debts. (*Douse* v. *Lady Torrington*, 2 My. & K. 600; *Palmer* v. *Graves*, 1 Keen, 545.) Nor does it apply where the payment is directed to be made *by the executors*. (*Powell* v. *Robins*, 7 Ves. 209.) But if the executors are devisees of real estate,

the Real Estate comprised in the Will. (1507.) But it has been decided that a Creditor who by lapse of time and neglect has lost his Legal (1148.) remedy, cannot revive his claims by virtue of a provision made by his Debtor's Will for the payment of just debts(*a*). (1508.) The Lands of Traders, or persons capable of becoming Bankrupts, descending upon their heirs, are by St. 47 G. 3, sess. 2, c. 74, made Assets, to be administered in Courts of Equity, for the payment of all their just debts; but with a preference given to Creditors by Specialty in which the heirs are bound (*b*). (1372.)

Burke v. Jones, 2 V. & B. 275; [Jones v. Scott, 1 R. & M. 255; S. C. reversed in D.P.; Evans v. Tweedy, 1 Beav. 55.]

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the real estate devised to them is liable; (*Henvell* v. *Whitaker*, 3 Russ. 343;) unless it appears from the context of the will that the testator did not so intend it; (*Wasse* v. *Heslington*, 3 My. & K. 495; *Braithwaite* v. *Britain*, 1 Keen. 206;) and if some only of the executors be devisees, it is not enough to render the estate devised liable. (*Warren* v. *Davies*, 2 M. & K. 49.)]

[(*b*) And now, by St. 3 & 4 W. 4, c. 104, the lands of *any person*, whether freehold or copyhold, which he shall not by his will have charged with or devised subject to his debts, are made assets to be administered in Courts of Equity for the payment of his just debts; and the heir, customary heir, or devisee, shall be liable to the same suits by any of the creditors, as the heir or devisee was before liable to by creditors by specialty in which the heirs were bound;—but the like preference is preserved to creditors by specialty in which the heirs are bound. It seems that neither this Act nor the Acts of 3 & 4 W. & M. c. 14, 47 [887, n.] G. 3, c. 74, & 1 W. 4, c. 47, charge the real assets with the debts, but only make the heir or devisee personally liable to answer for the value of the assets. See *Sparkman* v. *Trimbrell*, 8 Sim. 253.]

(1509.) It is a frequent practice also to charge Legacies upon Land. Such charges have no actual existence until they become vested; and in general, unless it be otherwise provided they do not vest until they become payable; (1510.) but this rule has its exceptions; and in particular it should be observed whether the payment appears to be postponed from the circumstances of the legatee and reasons of the gift, or from the condition of the land itself and its ability to bear the Charge; for in the latter case the legacy may vest immediately. (1511.) The rules of the Roman Law, which are much followed in the construction of Wills relating merely to personal estate, are more favourable to the immediate vesting and indefeasibleness of Legacies, than those which our Courts have established respecting testamentary charges upon Land; (1512.) but the former are not allowed to control the latter; and where, from the Legacy being given out of a mixed fund, or charged upon the Land in aid only of the Personal Estate, room is afforded for the application of both systems, yet the prevalence of each is confined to its own province; and the Land, so far as recourse must be had to it, is no otherwise affected than if it were the only source of payment.

Butl Co. Litt. 237. a. n. 1; Butl. Fearne, C. R. 552. n.; 4 Bac. Ab. 399.

4 Bac. Ab. 399, & 1 Fonbl. 259. n.

(1513.) Where a person who has the absolute interest in an equitable Charge upon Land becomes also entitled to the Land itself in fee simple, the Charge becomes extinguished, un-

1 Sand. Us. 305; 2 Fonbl. 163.

less the party either take some measures for its continuance, (1514.) or die under circumstances which require it to be kept up; which will be the case if his Assets are otherwise deficient for the satisfaction of Creditors; (1515.) or if he did not attain his full age, but disposed of the (937.) money by Will, for then his legatees ought not [See 937, n.] to be deprived of the intended benefit by an accident against which he was unable to provide. (1516.) And if the Estate descend upon Coparceners, who are previously entitled to 1 Sand. Us. 309; Smith *v.* Frederick, 1 Russ. 174. equal sums of money charged upon it for their Portions, the like extinguishment will take place; for the Portion of each will be considered, for this purpose, as a Charge upon her Share of the Estate only. (1517.) But these rules do not apply to the case of a mere Tenant 1 Sand. Us. 305; *Ex parte* Digby, Jac. 235; Pitt *v.* Pitt, 1 Turn. 180. for Life, or person in a similar situation; for if he had originally a Charge upon the Land, or if he pay off one to which another person is entitled, it will continue for his benefit, unless he takes measures for its extinction. (1518.) The intermediate case of a Tenant in Tail seems 2 Sand. Us. 305; E. of Bucks *v.* Hobart, 3 Swanst. 186; [and see Drinkwater *v.* Combe, 2 S. & S. 340.] also to resemble that of Tenant for Life, when the person entitled to the charge succeeds under the entail to the ownership of the land. (1519.) But if Tenant in Tail, having power to suffer a Recovery, pay off any charge to (682, &c.) which the land is subject, an intention of ex- [See 682, n.] tinguishing it will, in the absence of special circumstances, be presumed.

Sect. 3.—*Of Constructive Trusts, or Equities, and Charges.*

(1520.) By ss. 7 & 8 of the Statute of Frauds, (29 Car. 2, c. 3,) " All Declarations or Crea-" tions of Trusts or Confidences of any * " Lands, Tenements or Hereditaments, shall " be manifested and proved by some Writing " signed by the party who is by Law enabled " to declare such Trust, or by his last Will in " writing, or else they shall be utterly void and " of none effect.

(1521.) " Provided always, that where any " Conveyance shall be made of any Lands or " Tenements by which a Trust or Confidence " shall or may arise or result by the implication " or construction of Law, or be transferred or " extinguished by an act or operation of Law, " then and in every such case such Trust or " Confidence shall be of the like force and " effect as the same would have been if this " Statute had not been made."

(1522.) This Proviso, it will be observed, requires that an actual Conveyance should be made of the Land, before any implied or constructive Trust can attach upon it; but this

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* (1520. *n.*) This enactment extends to Copyholds, (*Withers* v. *Withers*, Amb. 151,) and to Leaseholds, (*Riddle* v. *Emerson*, 1 Vern. 108.)

condition has not in all cases been attended to by Courts of Equity; which in this department of their jurisdiction, have more signally outrun the Law than in any other. Among the cases which come within the letter of the Proviso, we may here enumerate those already mentioned of Resulting Trusts, and Terms attendant on the inheritance by implication, and perhaps the occasionally presumed Trust of an Executor for the next of kin of the Testator. (1453, 1429. 1423, &c.) [See now, 1423, n. *a*.]

(1523.) Another case is where Land is purchased in the name* of one person, but with the money of another. If this fact appear upon the face of the Conveyance, it will in general be sufficient without any further declaration to create a Trust for the true Purchaser; unless indeed the nominal Purchaser be his Child, or orphan Grandchild, and otherwise unprovided for, or his Wife. (1525.) But if the money appear on the face of the Deed to have belonged to the nominal Purchaser, it has been thought that no Trust can be raised unless by his own confession made in Court or by writing. 1 Sand. Us. 322. 325; 2 Fonbl. 116, &c.; Sugd. Vend. 596. [Crabb *v.* Crabb, 1 My. & K. 511.]

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* (1524.) Where a Purchase is made in the names of two or more persons, with the money of both, or all, if that money be advanced by them in equal shares, they will be Joint-tenants in Equity as well as at Law; but if the purchase money be contributed unequally, the Equitable Estate will be divided between them, as Tenants in Common, in the same proportion. Sugd. Vend. 588. As to Purchases of Land made with the Partnership Property or Joint Stock of Traders, see Sugd. Vend. 591. n. [Phillips *v.* Phillips, 1 My. & K. 649; Randall *v.* Randall, 7 Sim. 271; Bligh *v.* Brent, 2 Y. & C. 268.]

1 Sand. Us. 325. (1526.) On the other hand, however, there is no doubt that Parol Evidence may be admitted in the nominal Purchaser's own favour; for it is a general rule that implications of Law, founded on mere presumptions of intention, and derogating from the full operation of the party's (506. 1426.) own act (such as are Uses and Trusts resulting or implied upon a Conveyance,) may be rebutted or negatived by such evidence; whence it becomes important that a complete declaration should always be made in the written instrument. Sugd. Vend. 608. (1527.) If Trust Money, of which the identity can be clearly traced, has been misapplied in the purchase of Land, the Trusts of the money will attach upon the Land; either (1439.) converting it entirely into personalty, or constituting a charge upon it, accordingly as the whole or a part only of the Purchase Money was taken from the Trust Fund. (1528.) And where there is a Covenant to lay out money in Sugd. Vend. 610, 611. land to be held upon any Trusts, whatever purchase is made will in general be considered as made with a view to the performance of that Covenant, and with the money to which it relates.

(1529.) If a Trustee or Guardian procures the renewal of a Lease committed to his charge, 1 Sand Us. 335; Coote Mortg. 562. or buys in an incumbrance affecting the estate, this will be construed as done for the * benefit

* (1529. *n.*) It seems to be otherwise if the Infant or Cestui que trust be not justly entitled to the Land, and the Guardian or Trustee purchase it from the rightful owner. 1 Sand. Us. 337.

of his Ward or Cestui que trust: but he will be entitled to be reimbursed the money which he has laid out, with interest. (1530.) The same principle, combined with a suspicion of Fraud, causes a Court of Equity to set aside purchases made by the Trustee from the Cestui que trust himself, or by Professional Men, (whose employment relates to the estate,) from their Clients. (1531.) But the rule is not universal. A Mortgagee may purchase the Equity of Redemption from his Mortgagor; and a Trustee for Sale, though he can never be allowed to purchase indirectly from himself, may enter into a Contract with the person by whom he is trusted. (1532.) There seems to be no objection to Tenants for Life and Reversioners or Remaindermen purchasing the estate from each other, or from the Trustees of the Settlement under which they claim.

1 Sand. Us. 362.

1 Turn. 76. 86.

(1533.) In cases of Fraud and Mistake, Courts of Equity impose on the holder of the estate the obligation, though it may be impossible to create the confidence, of a Trust. And thus they go beyond the Courts of Law in setting aside improvident sales of reversionary interests for an inadequate price; (1534.) Catching Bargains, or unequal Wagers, under which extortion shelters itself from the penalties of Usury; (1535.) interested or illusory executions of Powers * given for the benefit of

1 Fonbl. 127. 135; Sugd. Vend. 232. 236. [1 Sugd. Vend. 444, &c.]
Ld. Chesterfield v. Jansen, 1 Atk. 339.
Sugd. Pow. 403. 488.

(184.)

* (1536.) Where a Power is exercisable for the party's own benefit, and he makes a *voluntary* disposition of the

1 Turn. 13; Broderick *v.* Broderick, 1 P. W. 239; Gordon *v.* Gordon, 3 Swanst. 400; Goddard *v.* Snow, 1 Russ. 485. Fearne, C. R. 98, &c.; Beaumont *v.* Bramley, 1 Turn. 41.

others; (1537.) and also in general all contracts in which one party takes advantage of the other by an abuse of authority, or by misrepresentation or concealment of facts. (1538.) In the same manner Conveyances may be rectified which are not conformable to the intention of the parties; at least if that intention be clearly stated in the Recitals. (1539.) Such cases, it is obvious, afford a wide field of discretionary jurisdiction, which can never be completely hedged in with precedents; though it is not without certain fixed land-marks, which exclude, in a great degree, the mischiefs of uncertainty.

Sugd. Vend. 523; Coote Mortg. 248.

(1540.) Where, upon a Sale, the Land has been conveyed to the Purchaser, but the price, or part of it, has not been received, the sum thus kept back forms an Equitable Lien or Charge upon the Land; which, however, the Vendor will in general be deemed to have waved, if he take any other sufficiently sub-

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estate, whether by Deed or Will, Equity, extending by analogy the provisions of the St. 13 El. c. 5, and * that of
(222. 887.) Fraudulent Devises, (3 W. & M. c. 14,) gives to the Creditors of the party exercising the Power, the same advantages as they would have been entitled to by Law, if he had made the same disposition by virtue of an actual commensurate ownership. *Lord Townshend* v. *Windham*, 2 Ves. 1; Sugd. Pow. 336. 349.

* It should have been observed that testamentary appointments of real property, in exercise of a Power for that purpose, are within the *words* of the Statute of Fraudulent Devises. [Addendum to the original edition.]

stantial security; though not by his accepting the Purchaser's personal engagement by (*a*) Bond, Covenant, or Promissory Note, or an incipient payment by Bills of Exchange. (1541.) The nature of the Charge or Lien thus created has been the subject of much controversy; the doubt being, whether an implication, originally made for the benefit of the Vendor only, can be properly extended, after the Purchaser's death, to the advantage of his other Creditors and of his legatees. In general when a Charge is made by Mortgage, the Land, as we have seen, is considered, so far as the interests of such claimants are concerned, (though no further,) as the primary fund for its payment: and this is perfectly reasonable; for whoever makes a Mortgage, shows an intention of increasing his Personal Estate for some purposes, at the expense of his Real; and the purposes apparent after his death are, the satisfaction of his debts and legacies. But he who purchases Land, though without paying for it immediately, seems to show the contrary intention of increasing his Real at the expense of his Personal Estate, and therefore, with respect to legatees at least, whose only claim is from the Testator's bounty, there appears a considerable difference between the two cases.

Sugd. Vend. 531; Coote Mortg. 254.

(1474.)

[(*a*) But where the conveyance was made in consideration of a bond, the vendor has no lien. *Parrott* v. *Sweetland*, 3 My. & K. 655.]

(1542.) If the Purchase Money be paid, but not to the proper person, the effect must be the same as if it were not paid at all; and in general it ought to be paid to the person who is ultimately entitled to it in Equity, and not to be left in the hands of a Trustee. Hence the absence or disability of any of the persons who are known to be entitled to the produce of a sale has often proved an obstacle to its completion; and so, where the debt secured by a Mortgage arose from a loan of Trust money, or has been made the subject of a Settlement by the Mortgagee, much difficulty may occur to the Mortgagor (if he be informed of that circumstance) in paying it off. (1543.) To obviate these inconveniences, it is usual, where any Trust for Sale is created, whether in a Deed or Will, to insert a * Clause enabling the Trustee to give effectual Receipts; (1544.) and where Trust Money is invested in a Mortgage, or the money already secured by Mortgage is made subject

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* (1543. *n.*) It is advisable in this Clause not to mention the Trustees by name, but to give the authority to the "Trustees or Trustee for the time being," or "acting in "the execution of the Trust," in order that if any Trustee refuse to act, no question may arise as to the validity of
(212.) his Disclaimer. See Sugd. Vend. 516; *Nicloson* v. *Wordsworth*, 2 Swanst. 370; *Adams* v. *Taunton*, 5 Mad. 435. It may also be proper in some cases to provide that the Purchaser shall not be obliged to ascertain the existence of the circumstances by which the discretion of the Trustees in making a sale is to be regulated. See Sugd. Vend. 514. 513. 501.

to any Trust, the transaction may for the most part be so managed as that the persons advancing the money shall not appear to the Mortgagor in the character of Trustees, but as dealing with their own property*. (1480.)

(1545.) It may be thought singular that the general practice of individuals should thus be opposed to that of the Courts; and the wisdom of a Rule, which it is found so expedient to dispense with, may be questioned: but it should be remembered that the Rule is the result of judicial caution, and of that general distrust of human honesty upon which all laws are founded; while the deviation from it arises from private discretion and the party's personal confidence in the Trustees whom he has chosen, a reason which is necessarily confined within his own breast. (1546.) Nor are decisions wanting by which the inconveniences of the Rule have in a great degree been removed. For a purchaser is not obliged to see to the application of the money, if the land be either directed to be sold, or merely charged, for the payment of † debts Sugd. Vend. 501. 505.

* (1544, *n.*) This is desirable, because if any mention of the Trusts is introduced in the Deed by which the Mortgage is made or transferred, it is generally done by reference to some other instrument; and if this Instrument cannot afterwards be produced, a suspicion may arise that it did not authorize the loan, or was inconsistent with the validity of the Clause for giving Receipts.

† (1547.) Hence the Rule offers no impediment in general to the purchase of a Chattel Interest from an Execu- (931.)

which are not specified; (1548.) and though legacies should also be charged, yet the indefinite nature of the trust which is to be first executed, and may exhaust the whole fund, exempts the Purchaser, after payment to the Vendor, from all liability; though if legacies only are charged, or the debts are ascertained, it is otherwise. (1549.) So, if there be an express trust to sell for the benefit of Infants, who cannot give an effectual Receipt, that of the Trustees will be sufficient: and it is said that, wherever the application of the money requires time and discretion, the Trustees may give a discharge; and that where it is to be invested in the Funds (which may be done immediately) the Purchaser is only to see that this is effected, and a proper Declaration of Trust executed. (1550.) And with respect to Mortgages, it has been decided that a power given to Trustees to invest money in * such securities implies a power to discharge the Mortgagor upon repayment to them, notwithstanding his knowledge of the Trusts.

[Watkins v. Cheek, 2 S. & S. 199; Johnson v. Kennett, 3 My. & K. 624; Eland v. Eland, 1 Beav. 235.]

Sugd. Vend. 502; Lavender v. Stanton, 6 Madd. 46.

Sugd. Vend. 503. See Doran v. Wiltshire, 3 Swanst. 699.

Wood v. Harman, 5 Madd. 368.

(1551.) The *Transfer or Extinguishment* of a Trust or Confidence by act or operation of
(1521.) Law, which is saved by the 8th section of the

(932.) tor. But if there be a legatee of the Chattel, it is desirable to have his concurrence, as the Executor may have done some act amounting to an Assent to the bequest. Sugd. Vend. 517. 522.

* (1550. *n.*) As to the general Power of Trustees to make investments, see 1 Sand. Us. 366.; 2 Fonbl. 185. [See Stickney v. Sewell, 1 My. & C. 8; Buxton v. Buxton, ib. 80; Drake v. Martyn, 1 Beav. 525.]

Statute, seems to depend upon the doctrine of Notice. For where the legal property is conveyed (1375.) with notice of the Trust, or without a sufficient consideration, the obligation of the Trust accompanies and is transferred with it; but if the Conveyance be without notice, and for valuable consideration, the Trust is extinguished. It is proper therefore in this place briefly to consider what may amount to a constructive Notice, where no actual Notice is given by any of the Sugd. Vend. 710. parties interested, in time to prevent the completion of the Contract. (1552.) And first, the actual pendency of a Suit in Equity is regarded Id. 715. as Notice to all the world (*a*); though after a complete decision the public attention may be supposed to be drawn off to other matters, and therefore a person is allowed to be ignorant of a final Decree of the Court, made in a cause in which he was not concerned. (1553.) But the pendency of a Suit will not, any more than Coote Mortg. 418. other kinds of notice, preclude a person who had (1436.) previously completed his contract in ignorance,

[(*a*) But now, by St. 2 Vict. c. 11, s. 7, it is enacted, that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum of such particulars thereof as are specified in the Act, shall be left with the Senior Master of the Court of C. P. at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*;—and the provisions of the Act as to the re- [878, n.] entering of judgments every five years, are extended to cases of *lis pendens*.]

from getting in the legal estate by any means in his power; nor though he be a party to the Suit, will he be prevented from doing this at any time before a Decree has fixed the order of all the claims in question. (1554.) Formerly the issuing of a Commission of Bankruptcy was not

Sugd. Vend. 719.

held to be a fact of which knowledge was in general to be presumed; but by the late Bankrupt Act, (St. 6 G. 4, c. 16, s. 83,) "The issuing "of a Commission shall be deemed Notice of "a prior Act of Bankruptcy (if an Act of Bank-"ruptcy had been actually committed before "the issuing of the Commission) if the Adjudi-"cation of the person or persons against whom "such Commission has issued shall have been "notified in the London Gazette, and the per-"son or persons to be affected by such Notice "may reasonably be presumed to have seen the "same"(a). (1555.) The Docketing of Judgments, and Registration of Deeds, is not con-

(878. 235. 1015.)

Sugd. Vend. 719.

sidered as making them notorious; and yet a Purchaser of Land in a District where a Register is established, cannot, if he neglect to search the Register, be acquitted of carelessness; but where the Legal Estate has for upwards of

(1365.) twenty years been continually outstanding in

[(a) It will be recollected that further protection has been afforded to purchasers against secret acts of bankruptcy and fiats, by St. 2 Vict. c. 11, ss. 12, 13, and St. 2 Vict. c. 29; which see above, 249, n. 250, and n.]

Trustees, the (*a*) search for Judgments may perhaps be properly dispensed with; for though the Statute of Frauds enables the Judgment Creditor of the Cestui que trust to seize the land under an Elegit, it requires that the Title of the latter should continue *at the time of the Execution issued*, and therefore imposes no lien upon the property in the hands of a Purchaser (*a*); though if he have notice of the Judgment, a lien is created by the general rule of Equity. (882.) (875.)

(1556.) Notice of any fact which is sufficient to put a Purchaser upon inquiry is held to imply Notice of other facts to which that inquiry would lead; thus the possession of the Title Deeds by a stranger may indicate a concealed Mortgage; or that of the Land itself, a prior agreement for the purchase of it: the absence of the Receipt for purchase money, usually indorsed upon a Deed in addition to the formal acknowledgment contained in its body, creates a suspicion of nonpayment, unless there be a Recital of payment at a former time; and it is said that the fact of Marriage affords sufficient Notice of a Jointure; but it seems Sugd. Vend. 723. 2 Sand. Us. 305; 1 Prest. Abstr. 299. (535.)

[(*a*) See now, 873, n., 878, n. An outstanding legal estate, as we have seen, is now no longer a protection; and Sir E. Sugden, after discussing the late acts, lays it down, that in *no case* should a purchaser now dispense with a search, and that although the provision in St. 2 Vict, c. 11, s. 5, (above, 878, n. *,) is a great safeguard to purchasers, yet it would not be safe to rely upon it, as notice may be proved by slight circumstances. See 2 Sugd. V. & P. 402, 3.]

2 Fonbl. 152; 1 Id. 163, &c. that in all these cases, if upon due inquiry the Purchaser be deceived, not he but the persons Sugd. Vend. 9. who made the misrepresentation will suffer. (1557.) In the same way wherever one Deed is recited, or barely mentioned in another, all the contents of the former are presumed to be known to a person who has seen the latter, or is aware of its existence. (1558.) Lastly, whatever knowledge is obtained by the Purchaser's Counsel, Attorney, or Agent, is presumed undeniably to have been communicated to the Purchaser himself; unless it was obtained in a different transaction, and at some distance of time. Hence much inconvenience may sometimes arise from the Vendor and Purchaser employing the same Agent or Solicitor.

Sugd. Vend. 712. [Kennedy v. Green, 3 M. & K. 699; Dryden v. Frost, 3 M. & C. 670.] 1 Turn. 280; [See Hargreaves v. Rothwell, 1 Keen, 154.]

(1559.) Among those cases of Constructive (1520. 1521.) Trust, which, as not arising from any actual Conveyance of the Land, are not compatible with a strict interpretation of the Statute of Frauds, we may reckon the remedy afforded by Equity upon a defective execution of Powers. Sug. Pow. 344. The general rule here is that an Agreement or attempt to execute a Power of Appointment, which fails of legal effect from the omission of (173.) some ceremony, will be made good by Equity, if it be for the benefit of a Purchaser, of Creditors, or of a Wife, or legitimate Child. (1560.) On the same principle, the neglect of a Copyholder to surrender his estate to the (1288.) use of his Will, would, before the St. 55 G. 3, c. 192, have been remedied by Equity in

favour of a Devisee who belonged to any of the meritorious classes just mentioned. (1561.) But a Power which is given not by any Settlement or Contract, but by the Law itself, as that of Tenant in Tail (*a*) to suffer a Recovery, or make Leases, if imperfectly exercised, cannot be aided. Sug. Pow. 370. (682. 716.)

(1562.) Another case is that of Election, which is grounded on the reasonable principle, that a person who receives benefit from an Instrument, shall not be allowed to defeat any of its provisions in favour of others. This principle is recognised in some instances by the Courts of Law, as where a Jointure is given to the Widow by her husband's Will (*b*), if she accept it she must renounce her Dower, and *vice versâ;* but this is in mere conformity to the Statute of Uses. In Equity the Widow is often put to her (*b*) Election, where the testamentary or postnuptial provision is not properly a Jointure under that Statute; and in general where a Testator, or other Donor, affects to 7 Bac. Ab. 445. (361.)

[(*a*) And it will be recollected, that such equitable aid is expressly excluded in the case of dispositions by tenants in tail or consents by protectors under St. 3 & 4 W. 4, c. 74. See s. 47.] [691, n.]

[(*b*) Under the late Dower Act, cases of election under the husband's will cannot often arise. If the provision for widow be out of the lands liable to dower, her dower is barred; if out of the personal estate, or out of lands not liable to dower, it is not affected; unless, in either case, a contrary intention be declared. See ss. 9, 10, above, 351, n.] [3 & 4 W. 4, c. 105.]

Halford *v.* Dillon, 2 B. & B. 12.

give the property of *A.* to *B.*, at the same time bestowing some other benefit on *A.*, but without any express condition, the interference of Equity becomes necessary, and will be afforded, in order to give the fullest possible effect to the Donor's intention. (1563.) But this interference cannot be carried further than the proposal of an option to *A.*, upon which if he refuse to relinquish his original rights, he will be deprived of those which the Donor's bounty would otherwise have conferred on him; or, if the gift be of greater value than the property retained, he may perhaps be allowed, after making full compensation to the disappointed claimants, to receive the surplus; but this last is a point not quite settled. (1564.) Wherever the Court can compel an Election, it may also be effectually made by the voluntary acts of the parties; provided that they have the property in their absolute disposal; but what acts shall amount to sufficient evidence of their determination, must depend very much on the particular circumstances of each case.

See Dillon *v.* Parker, 1 Swanst. 259; Gretton *v.* Haward, Id. 409, and notes; Sug. Pow. 380; Jac. 115. 503. 534; 1 Russ. 129.

[See 2 Rop. Leg. 571, &c.]

Jac. 319; 1 Swanst. 433 n.; Sug. Pow. 380.

1 Swanst. 381. n.

(1565.) With respect to Trusts arising from Contracts of Sale, or in contemplation of Marriage, the 7th section of the Statute of Frauds is fortified by the 4th, in which it is enacted, (among other things) " That no Action shall " be brought whereby to charge any person " upon any Agreement made upon considera- " tion of Marriage, or upon any Contract or " Sale of Lands, Tenements, or Hereditaments,

(1520.)

"or any interest in or concerning them, unless "the Agreement upon which such Action shall "be brought, or some Memorandum or Note "thereof shall be in writing and signed by the "party to be charged therewith, or some other "person thereunto by him lawfully authorized."

(1566.) Notwithstanding which however, if it appear that the Agreement remained unwritten or unsigned through the fraud of the party to be charged with it; or if he had delivered the possession of the land to the other party, or otherwise induce him to commence in a decided manner the performance of his part of the engagement, Courts of Equity will not suffer the former afterwards to evade the Contract by pleading the Statute of Frauds. Sugd. Vend. 100.

(1567.) But payment* of any part of the Purchase Money, is not, it seems, a sufficient Part-Performance for this purpose; for upon a Sale of Goods the Statute (in s. 17,) has expressly made it so, but is silent as to Land, and the contrast shows the intention of the legislature. Sugd. Vend. 104. 110.

(1568.) It will be observed that, by s. 4, the signature of an agent *lawfully authorized* is sufficient, and it is not required (as in sections 1 & 3,) that the authority should be in writing; the fact of Agency, therefore, in cases relating to the signature of a mere Agreement, (1565.) (166, 167.) Sugd. Vend. 90.

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* (1567. *n.*) A written Receipt for the money may however in itself amount to an Agreement for Sale. Sugd. Vend. 75.

may be established both at Law and in Equity, by parol evidence; and in Sales by Auction the (*a*) Auctioneer himself is held to be the authorized Agent of both parties, so far as to satisfy the Statute. (1569.) And though parol evidence cannot be admitted to vary or make any addition to the terms contained, or by reference, incorporated, in the written agreement; yet it may be shown by such evidence that the Agreement itself has been waved or discharged.

Sugd. Vend. 93.

Id. 118.

Id. 131.

(1570.) Another and perhaps a less justifiable encroachment of Courts of Equity upon the Statute of Frauds, consists in attributing the effect of a Mortgage to a mere * deposit of the Title † Deeds of an Estate. The mere delivery of the Deeds to a Creditor, without a word spoken, is held sufficient to charge the debt

Coote Mortg. 200.

* (1571.) The Lien which an Attorney or Solicitor has upon Deeds or other Documents in his hands, for money due to him in respect of his Employment, is of another kind. This is recognized by Courts of Law as well as of Equity; and it does not otherwise affect the Land itself, than by the inconveniences of detaining the Evidences of Title. 1 Bac. Abr. 303, &c.

† (1570. *n.*) The rule is not confined to Deeds, but applies to the Copies of Court Roll, where the Land is Copyhold; but it seems that all the necessary Muniments of the Estate, whatever be its nature, must be delivered. Coote Mortg. 203, and Addend.

[(*a*) And so, too, is his clerk, who openly takes down the biddings. *Bird* v. *Boulter*, 4 B. & Ad. 447.]

upon the land; (1572.) nor does it appear to make any difference whether the deposit were intended as a complete security, or were made with a view to the preparation of a more perfect Mortgage. (1573.) The Security may also be extended, or confined, to future debts, if such appear to have been the intention of the parties: (1574.) and the Deeds may be delivered to a Trustee for the Creditor (*a*).

Hockley v. Bantock, 1 Russ. 141.

Coote Mortg. 201; Mountford v. Scott, 1 Turn. 274.

(1575.) Lastly, this dispensing power of the Courts of Equity is not confined to the Statute of Frauds; for the doctrine of Notice has been allowed to break in upon the Registry Acts, so that a Purchaser may be affected with a Trust, through Notice of an unregistered Deed. (1576.) But it seems that in this case a mere Constructive Notice is not sufficient; there must be clear proof of an actual Notice, amounting to Fraud in the Purchaser; and under this restriction the rule cannot be thought objectionable, since no person can be affected by it whom it was the intention of the legislature to protect.

(1551.) Sugd. Vend. 678.

(235.)

19 V. J. 439.

(1551, &c.)

[(*a*) An equitable mortgagee may have a decree for foreclosure, allowing the mortgagor six months to redeem. (*Parker* v. *Housefield*, 2 My. & K. 419.) He may also, it seems, after the mortgagor's death, have a decree for sale, and go against the general assets for the deficiency; but whether he can have such decree for sale in the mortgagor's lifetime, seems at least doubtful. (*Pain* v. *Smith*, 2 M. & K. 417; but see *Brocklehurst* v. *Jessop*, 7 Sim. 442.) If the mortgagor be bankrupt, an order for sale may be obtained on petition in the Court of Review. (*Exparte Payler*, 16 Ves, 434; *Smith* v. *Phillips*, 1 Keen. 694.)] [1582, n.]

(1577.) The origination and continuation of Equitable Rights by mere Implication or Construction, may be considered as one of the causes of that uncertainty and liability to accident, which must be confessed to affect in some degree the Title to Real Property. And therefore length of time is in general allowed to operate as a bar to the enforcement of Constructive Trusts: (1578.) and it seems also that where the Trust or Equity is of a very doubtful nature, it will not be held to attach upon a Purchaser, though acquainted with the circumstances.

(1373.) Sugd. Vend. 597; 1 Sand. Us. 290, 363. n.; Jac. 513. 1 Turn. 11. 12. 55. [See now, 1379, n.]

1 Sand. Us. 321; Sugd. Vend. 730.

Sect. 4.—*Of the Concurrent Jurisdiction of Courts of Equity with Courts of Law.*

(1579.) The merely Equitable interests of which we have hitherto been treating in this Chapter, are for the most part cognizable by Courts of Equity only; but the subjects of these interests, the Lands and Tenements upon which they attach, are equally, and indeed primarily, within the jurisdiction of the Courts of Law; and the result of the system may be said to be, that what on one side of Westminster Hall is held to be the absolute property of *A.*, on the other side is decided to belong in effect no less absolutely to *B.*, or at least to be subject to his claims. In order that two such apparently opposite sentences may stand together, it is evident that some compromise or understanding must subsist between the two

Courts; that what is asserted by the one must be admitted, in some sense at least, by the other; and that it must be ascertained to which of the two the right of qualifying the first decision, and of pronouncing the final decree, and enforcing it when pronounced, is to be ascribed. (1580.) And accordingly we find that Equity always admits and supposes the authority of the Common Law; but on the other hand, whatever doubts and contests may have arisen formerly on these subjects, it is now fully settled that the clearest Legal Right is no answer to a preferable claim in Equity, and that whoever attempts to enforce the former to the detriment of the latter, though by strictly legal means, may be restrained by the * Injunction of a Court of Equity, or punished for proceeding in contempt of it.

(1581.) Hitherto then we have been considering † Equity in her highest pitch of supe-

* (1580. *n.*) As to Injunctions to restrain the repetition of Ejectments, see Mitf. 127. (408.)

† (1582.) Those parts of the Chancellor's Jurisdiction which are not referable to the general system of Equity, but to a peculiar Commission always attending the Great Seal, do not here require a particular consideration. Such are the custody of Infants, Idiots, and Lunatics; (as to which see 2 Fonbl. 237, &c; 1 Fonbl. 57, &c.) and the (*a*) principal Administration of the Bankrupt Laws, which now depends on St. 6 G. 4, c. 16. (241, &c.)

[(*a*) But see now, St. 1 & 2 W. 4, c. 56, by virtue of which the Court of Bankruptcy is established; the Judges of which, or any three of them, constitute, by s. 2, a Court [241, n.]

riority to Law: in another view she may be regarded rather as a successful rival. Thus,
1 Fonbl. 18. where a Partition is desired between Coparceners, Joint-tenants, or Tenants in Common,
Id. 22. or where a Widow's right of Dower is to be established, Courts of Equity have acquired a jurisdiction, and it has become more usual to proceed there than in Courts of Law; and the
(1185.) same may be said of Tithe Cases, as already noticed. So where the Tenant of a particular
See 7 Bac. Ab. 286, &c.; 1 Fonbl. 32. Estate is unlawfully committing Waste, the most effectual and speedy remedy for the per-
(718.) son next in succession is to apply to a Court of Equity for an Injunction to restrain him.

(1582.) But the most remarkable advantage which Courts of Equity possess over Courts of Law, in cases within the jurisdiction of both, is the practice of compelling the Specific Performance of Agreements, instead of merely awarding pecuniary damages for their non-
(1366.) performance. This practice indeed arises from the view which Equity takes of the Agreement as creating a Trust, and therefore depends on principles which have been generally stated already; but it may not be improper to consider them a little more fully in this place.

(1583.) We have seen that to enable a Court of Equity to decree a Specific Performance,

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of Review, having the jurisdiction in matters in bankruptcy, which the Lord Chancellor formerly had; but subject, by s. 3, to an appeal to the Lord Chancellor, in matters of law and equity, or on the refusal or admittance of evidence only.]

there must be an Agreement conforming to the Statute of Frauds, or exempted from it by peculiar circumstances. There must also be a sufficient Consideration for the Contract; and this may be either the foundation of a Family, as an intended marriage; or something simply commodious, as the stipulated release of a contested claim; or valuable, as money, or whatever money can purchase. The last kind of Consideration, where the alienation is intended to be complete, constitutes a Contract of Sale, and it is of such Contracts that we propose here to treat, though within limits little answering to the importance of the subject. (1565, &c.) 1 Fonbl. 318. 370; 1 Russ. 358.

(1584.) And first, if the transaction be otherwise unimpeachable, no objection can in general be made on account of the inadequacy or exorbitance of the Consideration; though it should be remembered that a grossly unreasonable price will afford a strong presumption of fraud; and where the interest sold is merely reversionary, great jealousy has always been shown on this point. (1585.) Nor does it appear that any accidental alteration of value, or even the total failure of the consideration on either side, happening subsequently to the signature of the Agreement, will be sufficient to excuse from its performance. (1586.) By the Agreement a day is ordinarily fixed for the completion of the engagement, by paying the price and executing the Conveyance; but as many accidental delays may occur, particu- Sugd. Vend. 231. Stilwell v. Wilkins, Jac. 280. Sugd. Vend. 236 (1533.) Id. 243. Sugd. Vend. 341, &c.

larly, in the investigation of the Title, Equity does not consider the time thus appointed as an essential condition of the Contract, unless it be expressly stipulated that it shall be so regarded; or unless the nature of the bargain or the conduct of the party applying to the Court, be such as not to merit indulgence; or unless the subject of the contract be so liable to variation (as in the case of a Coal Mine, or of a Life Estate or Reversionary Interest in Land) that lapse of time may materially affect its value. (1875.) In general, if the Contract be not completed on the day prescribed, the Purchaser will nevertheless be entitled thenceforward to the rents and profits of the Land, and must pay interest on his Purchase Money from the same time, at the rate of four per cent, unless there be some express stipulation on the subject.

Williams v. Attenborough, 1 Turn. 70; Withy v. Cottle, Id. 78.

Sugd Vend. 479. 489.

(1588.) Every Contract of Sale is made on an implied condition, (if it be not expressed,) that the Vendor shall make out a good Title to the property; and for this purpose he must at his own expense prepare an abstract of the necessary documents, and deliver it to the Purchaser or his Solicitor or Agent, and afford him the opportunity of comparing it with the Originals, or at least with Attested Copies. If there be any reasonable objection to the Title, the Purchaser is not bound by his bargain; though, if he consent to waive the ob-

Sugd. Vend. 192.

Id. 366, 367. 448.

jection, he may enforce the Contract against the Vendor.

(1589.) That alone can be considered a marketable Title, which a Court of Equity will compel an unwilling Purchaser to accept; and of such a Title it may be said in general, that it must be perfect, and free from doubt, both in Law and Equity; that it must be accompanied with its proper evidences: and that it must extend to all the property comprised in the Agreement, and to all the qualities of that property which are there expressed or implied.

(1590.) And first, the Title must be perfect both in Law and Equity. A merely Equitable Title is not, in general, sufficient; and much less a Title, however perfect in Law, to which there are objections in Equity. (1591.) But a mere Legal Right in a stranger, which cannot be enforced without Action, and that under circumstances in which Equity will either grant an Injunction against the Action, or at least prevent the plaintiff from enjoying its fruits, whilst he must suffer in the costs of the attempt, will not render the title defective. Thus the Dower of the Vendor's Wife may be sufficiently barred by an Equitable Jointure. And an Attendant Term, if assigned to a Trustee for the Purchaser, is sufficient for the same purpose; for though the Widow may recover her Dower at Law, it will be subject to the Term, against which Equity will not relieve

Sugd. Vend. 298.

(1485.)

(1580.)

(1365.)

Sugd. Vend. 321.

Mole v. Smith, Jac. 490.

(1437.)

2 V. & J. 128; 1 V. & B. 20. her; and in the Action of Dower, though successful, she must pay her own costs. (1592.)
(1367.) Sugd. Vend. 306. Morris v. Clarkson, 3 Swanst. 558. Also, where the Sale is made by the Court itself, it will not be admitted as an objection that the Legal Estate cannot immediately be obtained; as if it be vested in a person under
(204.) [See now, 204, n.] age, and who is a Trustee by construction only, and therefore cannot make an effectual Conveyance, or cannot be compelled to do so: (1593.) and yet, if the Purchaser re-sell the Estate before this inconvenience is removed, the second Purchaser may on that ground refuse the Title. In such a case, to make the property marketable, it is necessary to state the defect in the conditions of Sale, or otherwise incorporate a due notice of it in the Agreement. (1594.) So with respect to Lease-
Sugd. Vend. 294. hold Property, (except perhaps where it is held under a Corporation,) the Vendor cannot hold the Purchaser to his Contract (if there be no
[Souter v. Drake, 5 B. & Ad. 1002.] stipulation on the subject) without proving the Title of his Lessor; which it is generally not in his power to do. (1595.) And with respect
Sugd. Vend. 297. to Leases granted by Corporations, in consideration of the surrender of prior Leases, in a constant course of renewal, much difficulty arises from the non-production of the surrendered Leases, which may possibly contain declarations of Trust, or other grounds of Equitable claim, of which the Purchaser must be
(1557.1529) deemed to have Constructive Notice, though

he may find it impossible to procure actual knowledge (*a*).

(1596.) No Title can be considered as perfect which has its commencement within 60 years. Nor perhaps can 60 years' possession of an *undivided share* only of an estate be regarded as constituting a satisfactory Title to that share, without remounting to the origin of the partial ownership; since the share might be less than is represented, and a mere encroachment on the other shares in the division of the profits does not amount to an adverse possession. (1597.) And if the beginning of the Abstract indicates a Settlement of earlier date, or even a person as owner, who may have made such a Settlement by his Will, (which is likely to be discoverable in some Ecclesiastical Register,) this may be considered a sufficient reason for including that indicated or supposed Settlement in the inquiry; though if the Settlement, however evidently shown to have existed, cannot be produced, and other circumstances afford a just

Sugd. Vend. 289.
[See 417, n.]
(397.)
Coussmaker *v.* Sewell, Sugd. Vend. App. 20;

[(*a*) The St. 6 W. 4, c. 20, & c. 64, imposing restrictions on the renewal of leases by ecclesiastical persons, provides, that a recital in the renewed lease, stating the names of the *c. q. vie* in the last lease, and which of them (if any) are dead, or stating, (as the case may be,) the term of years in the last lease, and how much is expired, shall be deemed conclusive evidence of the matter recited. This however leaves the principal difficulty mentioned in the text untouched.]

[217, n.]

see also Prosser v. Watts, 6 Mad. 59. presumption that the entails created by it have been duly barred, the Purchaser, it seems, must rest contented.

(1598.) The perfection of the Title, in the view of Equity, includes its freedom from doubt. In an action at Law brought by the Purchaser, who has paid part of his Purchase Money, to recover it back on the ground that a good Title cannot be made, though Equitable as well as Legal questions will be entertained by the Court, yet nothing will be allowed to remain doubtful; for it is necessary to come to a decision: but in Equity, a doubtful Title, whether from the uncertainty of Law or of Fact, will not be forced upon an unwilling Purchaser.

Sugd. Vend. 219. Id. 300. Id. 298; Smith v. Death, 5 Madd. 371.

(1599.) The doubt however must rest on probable evidence; it must be more than a mere suspicion; and to determine the limits of such doubts is often a matter of very difficult discretion. Presumptive evidence has more than once been allowed to decide a question of Title between Vendor and Purchaser in a Court of Equity; and yet the Judges of the Courts of Law have refused to give their opinion on such evidence without the aid of a Jury.

Sugd. Vend. 309. Sugd. Vend. 308. 428. (916.) 5 B. & C. 937.

(1600.) Secondly, the Title must be accompanied with its proper Evidences. If neither the Title Deeds can be delivered to the Purchaser, nor a Covenant for their production entered into which may run on both sides with the Land, he can scarcely be secure in his possession, and would be greatly at a loss in making

(582.)

a sale or mortgage. But if a Deed appear to be lost, the degree of its importance to the Title, and the circumstances of its custody, as also the nature of the secondary evidence which can be afforded, will enter properly into consideration.

Sugd. Vend. 450.

(477.)

(1601.) The Purchaser is also entitled to Attested Copies (prepared at the Vendors expense) of those Instruments which are not delivered to him, except such as are of Record.

Sugd. Vend. 447.

(1602.) Sometimes it happens that a conveyance is executed, without any delivery of the Title Deeds or Covenant for their production, and it afterwards becomes a question whether the Purchaser has a continuing right to call for such a Covenant. It has been lately decided, in such a case, that, at least while the documents remain in the hands of the original Vendor, the Purchaser, upon a resale by him, may compel the production of them, in order to give effect to his sale; but a disinclination seems to have been shown to carry * the right further.

Fain v. Ayres, 1 Russ. 259, n.; [s C. 2 S. & S. 533.] Hallett v. Middleton, Id. 243. Sugd. Vend. 255; [Barclay v. Raine, 1 S. & S. 449.] [See 2 Sugd. V. & P. 118, &c. 122, &c. 458, &c.]

* (1603.) It is usual in Conveyances for the Vendor to covenant, that he and his heirs, and all persons having any claim through or under him or them to the property conveyed, will make any further Assurance of that Property that may be reasonably required; and this Covenant is qualified by such words as the following, " so as no such " further Assurance contain or imply any further or other " Covenant or Warranty than against the person or per- " sons who shall be required to make or execute the same, " and his her or their heirs executors or administrators " acts and deeds only." From these expressions it may be

(1604.) Lastly, the Title must extend to all the property comprised in the Agreement, and to all its qualities there expressed or implied. However, if the property be sold in lots, or in any way in which the price is divided and apportioned to several parts, and one of those parts be not necessary to the enjoyment of the others, the want of a good Title to such part will not affect the Contract as to the rest. And so where the price is entire, if the deficient portion be inconsiderable, a compensation may be ordered. (1605.) With respect to the quality of the Estate, nothing which is open to observation, or might be easily known before the Contract was made, can afterwards be objected. But if that which was sold as Freehold prove to be held only for a long Term of years, or Land described as Tithe-free be not sufficiently shown to be exempt from Tithe, the Purchaser

Sugd. Vend. 261; Id. 259. [See Smith v. Tolcher, 4 Russ. 302.]

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argued that the further Assurance, as it may contain a Covenant, may as well consist of a Covenant only; but that this Covenant must be of a negative kind, for it is to be *against*, and not *for*, the acts and deeds of the persons to whom it relates. Such however is or may be the Covenant for production of Title Deeds; in which it is not necessary that any thing more than a mere permission, or abstaining from hindrance, should be stipulated. It would seem therefore that while the Title Deeds remain in the hands of the Vendor, or of his heirs, (who are expressly subjected to the obligation, without reference to their possessing any claim upon the property conveyed,) a Covenant for their production may be required by virtue of this Covenant for further Assurance. See also on the subject of production of Deeds in general, 2 Fonbl. 488.

[And see 2 Sugd. V. & P. ch. 9, ch. 14.]

may refuse to accept it (*a*). (1606.) Freedom from adventitious incumbrances is implied in every Contract of Sale; nor will it be sufficient in general that other property of great value already partakes the burden, and that an *indemnity is offered. Id. 253. [Aylett v. Ashton, 1 M. & C. 105.]

(1607.) One other form of jurisdiction requires to be noticed, in which the Courts of Equity, instead of controlling or superseding, assist the efforts of the Courts of Law for the due administration of Justice. This is principally by entertaining Suits for the discovery of Documents; for the perpetuation of oral testimony; and for the removal of impediments to the Legal remedy, such as a Term of Years outstanding in a Trustee. (1608.) And on the other hand, the Courts of Law are frequently assistant to the Courts of Equity, by causing doubtful † facts, at the request of the latter, to be tried by a Jury; and by delivering their opinion on doubtful points of Law, which it may be necessary to decide in order that the 1 Fonbl. 9. 1 Sand. Us. 282. (618.)

* (1606. *n.*) As to the nature of the indemnity proper on such occasions, see *Cassamajor* v. *Strode*, 2 Swanst. 347.

† (1608. *n.*) In particular it appears to be now settled that if the validity of a Will of Real Estate be contested, the question must be referred to a Jury. 1 Fonbl. 13. 69.

[(*a*) Or he may insist on a conveyance of the vendor's interest, such as it is, with an abatement in the price. See *Thomas* v. *Dering*, 1 Keen, 729.]

question of Equity may be properly raised, or that the analogy between Law and Equity may be duly pursued. (1609.) Through this harmony between the two jurisdictions it is apparent that the evils of their separation must have been much diminished: and when we consider that that separation was caused by an anxiety in the Judges on the one hand not to exercise a discretion beyond the Law, and in the Chancellors on the other not to suffer the letter of that Law to be an impediment to the claims of substantial Justice, and that the result has been for the most part to reconcile the attainment of these two conflicting objects in a very high degree; it is impossible to regret the original disunion, however earnestly we may desire the removal of all those attendant inconveniences which are not essentially complicated with the actual benefits of the system. Upon this subject therefore, as upon the whole matter of the foregoing Treatise, we may conclude in the words of our old Sages, understood in their spirit, "Blessed be the amending hand."

4 Inst. Epil.

APPENDIX.

IN the course of the foregoing work, several occasions have occurred for making mention of the Laws observed in parts of the British Empire beyond the limits of England and Wales; but it has been thought advisable, at once, for preventing interruption and making room for some additions, to throw all that was necessary to be offered on this head into the form of an Appendix. And in the first place, for a general introduction to the subject, the reader is referred to 1 Bl. Comm. Introd. s. 4; and as to the Isle of Man, he may also consult Harg. Co. Litt. 9. a. n. 4, and 20. a. n. 5, and St. 6 G. 4, c. 34; and as to Berwick, *R.* v. *Cowle*, 2 Burr. 834. *Mayor, &c. of Berwick* v. *Shanks*, 3 Bing. 459. The general rules, that conquered countries retain their own laws until altered by the King; and that new Colonies, planted by English Subjects, are to be governed by so many of the previously established English Laws as are convenient for their situation; will be found fully illustrated in the Cases of *Hall* v. *Campbell*, Cowp. 204, and *Attorney-General* v. *Stewart*, 2 Meriv. 143; and that new English Statutes do not bind the Colonies which are not named in them, see 2 P. Wms. 75; 8 V. J. 487. Yet the St. 7 Ann. c. 19, (for which that of 6 Geo. 4, c. 74, is now substituted,) for enabling Infant Trustees and Mortgagees to make conveyances under the [See now, 204, n.]

direction of a Court of Equity, has been repeatedly extended to property in Foreign Settlements; see *Ex parte Anderson*, 5 V. J. 242; and also in Ireland, *Evelyn* v. *Forster*, 8 V. J. 96, which is the more remarkable, as the application might have been made to a Court in that Country. The St. 41 Geo. 3, c. 90, has established a correspondence between the Courts of Chancery in England and Ireland; but this seems to be confined to cases where Orders or Decrees are made for the payment of money.

[See p. 597, n. *a*.]

If a person be domiciled in England at the time of his death, the Probate of his Will, obtained from the proper Court in England, is binding on the Court which has testamentary jurisdiction in any Colony where his personal property may be situated. *Burn* v. *Cole*, Amb. 415.

The legacy duty is not payable in respect of a bequest made by a person domiciled in a Foreign Country or Settlement, though the money be remitted to the Legatee in England, unless some appropriation or distribution of it still remain to be made in this country before he can receive it. *Hay* v. *Fairlie*, 1 Russ. 117.

The principal Enactments of the British Parliament now in force, relating expressly to Real Property in the Colonies, (and some of which also affect Ireland,) are as follows:—

By St. 5 G. 2, c. 7, s. 4, " The houses, lands, " negroes and other hereditaments and real estates " situate or being within any of the plantations in " America, belonging to any person indebted, shall " be liable to and chargeable with all just debts, " duties and demands, of what nature or kind soever, " owing by any such person to His Majesty, or any " of his subjects, and shall and may be assets for the " satisfaction thereof, in like manner as real estates " are by the law of England liable to the satisfaction

" of debts due by bond or other specialty; and shall " be subject to the like remedies, proceedings and " process in any Court of Law or Equity, in any " of the said plantations respectively, for seising, ex- " tending, selling or disposing of any such houses, " lands, negroes, and other hereditaments and real " estates, towards the satisfaction of such debts, du- " ties and demands, and in like manner as Personal " Estates in any of the said plantations respectively " are seised, extended, sold or disposed of for the " satisfaction of debts "(*a*). But as to Negroes this Act has been repealed by St. 37 G. 3, c. 119. [And see p. 594, & n.]

The St. 25 G. 2, c. 6, (which makes void all bequests to the attesting Witnesses of a Will,) by s. 10, is extended to American Colonies, where the Statute of Frauds or any similar Statute is in force (*b*).

By St. 13 G. 2, c. 7, St. 2 G. 3, c. 25, and St. 13 G. 3, c. 25, Foreigners residing for seven years in an American Colony, and taking certain Oaths, (which virtually exclude Roman Catholics,) and Foreign Protestants serving two years in the Royal American Regiment, or as Engineers in America, and taking the Oaths, are naturalized, and made capable of Grants from the Crown in any of the Colonies.

By St. 13 G. 3, c. 14, Aliens, whether Friends or Enemies, may lend money at five per cent on Mortgages in the West Indies; on nonpayment, the lands to be sold.

The Statute of 12 Ann. St. 2, c 16, s. 1, (against

[(*a*) And by St. 9 G. 4, c. 33, real estate in India is made assets in the hands of the executor or administrator for payment of debts, whether by specialty or simple contract, in the ordinary course of administration.]

[(*b*) This Act, we have seen, is repealed by St. 1 Vict. c. 26, but with the exception of so much thereof as relates to the colonies in America.] [264, n. *a*.]

Usury) does not extend to Ireland or the Colonies; which for the most part have peculiar Laws, fixing the greatest rate of Interest at some higher point than in England. But where a Loan was made in this Country on the security of property lying beyond sea, it became a question which Legislature should give the rule; and this doubt was in the first place removed by St. 14 G. 3, c. 79, which imposed certain retraints on such transactions, and particularly restricted the rate of Interest to six per cent. This Act was afterwards explained by St. 1 & 2 G. 4, c. 51; but now by St. 3 G. 4, c. 47, the last explanatory Act is repealed, and the former seems to be superseded; for all such loans, both past and future, and the securities for them, are placed on the same footing as if made in Ireland, or in the West Indian Colony, where the mortgaged property is situated.

The Act for establishing a Registry of Colonial* Slaves in Great Britain, (St. 59 G. 3, c. 120,) has in its principal provisions been fully recited and confirmed by St. 5 G. 4, c. 113, s. 37. It prohibits all sales, mortgages, and charges of Slaves, made within the United Kingdom, unless the Slaves be previously registered at the Office according to the returns from the Colony, and enacts that after 1st January, 1820, "no Deed or Instrument, made or executed within "this United Kingdom, whereby any Slave or Slaves "in any of the said Colonies shall be intended to be "mortgaged, sold, charged or in any manner trans-

* As to the (a) emancipation of Slaves by force of the Common Law, wherever its effect is full and unimpeded, see *Forbes* v. *Cochrane*, 2 B. & C. 448.

[(a) Slavery has been abolished throughout all the British colonies. See St. 3 & 4 W. 4, c. 73; 5 & 6 W. 4, c. 45; 6 & 7 W. 4, c. 5; 1 & 2 Vict. c. 19.]

" ferred or conveyed, or any estate or interest therein " created or raised, shall be good or valid in Law, " to pass or convey, charge or affect any such Slave " or Slaves, unless the registered name and descrip- " tion, or names and descriptions of such Slave or " Slaves shall be duly set forth in such Deed or In- " strument, or in some Schedule thereupon indorsed " or thereto annexed, according to the then latest " Registration, or corrected Registration, of such " Slave or Slaves, in the said Office of the Registrar " of Slaves." This is followed by several Provisoes; that Instruments shall not be vitiated by the mistakes of Clerks; that Mortgages or Charges, made before the Act, (12th July 1819) may be transferred as formerly; that Wills, Probates, Letters of Administration, and Conveyances and Assignments made under the authority of a Commission of Bankrupt, or of any Court of Justice, &c. shall not be affected; and that the issue of Registered Slaves, born since the last Return, shall be considered as Registered.

The Bankrupt Act, St. 6 G. 4, c. 16, s. 64, empowers the Commissioners to convey all lands, tenements and hereditaments, not only in England, but in Scotland, Ireland, or in any of the Dominions, Plantations, or Colonies, belonging to His Majesty, of which the Bankrupt " might, according to the Laws " of the several Countries, Dominions, Plantations " or Colonies, have disposed." — " Provided, that " where according to the laws of any such Plantation " or Colony such Deed would require registration, " enrolment or recording, the same shall be so regis- " tered, enrolled or recorded according to the laws " of such Plantation or Colony; and no such Deed " shall invalidate the title of any purchaser for valu- " able consideration prior to such registration, enrol-

" ment or recording, without notice that the Com-
" mission has issued."(*a*)

And by s. 65, Estates Tail of Lands in Ireland may be barred by the Deed of the English Commissioners(*b*).

Ireland.

How Ireland became subject to the Common Law of England, and afterwards to all English Statutes down to the 10th year of Henry 7, the reader will find in 1 Bl. Comm. 100, &c. Since that time many more of our Laws have been adopted by the Irish Legislature, in addition to its own peculiar enactments; and by the 8th Article of the Act of Union, which took effect on the 1st of January 1801, the existing Laws of Ireland were confirmed, subject to such alterations as might be afterwards made by the Parliament of the United Kingdom. Hence in questions relating to Real Property in Ireland, it is still necessary to consult the Irish Statute Book; and therefore some notices of its contents are here subjoined, in the order of the preceding Treatise.

[242 n.] [(*a*) The description of the bankrupt's real estate, now vesting at once in his assignees by St. 1 & 2 W. 4, c. 56, s. 26, is equally comprehensive. And the registration of the certificate of appointment of assignees is required in all cases where, formerly, the deed required to be registered, inrolled, or recorded.]

[(*b*) All the provisions of St. 3 & 4 W. 4, c. 74, respecting bankrupts, are, by s. 68, extended to their lands in Ireland; but the deed of disposition by the Commissioner must be inrolled in the Court of Chancery there within six calendar months. (s. 69.)]

Chap. I.—Sect. 1.

The St. 4 H. 7, c. 24, is in force in Ireland; and by the Irish St. 15 Car. 1, c. 2, the Proclamations are to be made only once in each Term (*a*).

Chap. I.—Sect. 2.

The Statute of Uses, and that for the Inrolment of Bargains and Sales, are comprised in the 1 St. 10 Car. 1. Sess. 2, c. 1.

The Irish Statute of Frauds (7 W. 3, c. 12), is in the same words with that of England.

By 1 St. 6 Ann. c. 10, s. 15, declarations subsequent of the Uses of Fines and Recoveries are declared valid.

Chap. I.—Sect. 3.

The Statutes relating to the children of the King's subjects, born beyond sea, seem from their nature to be applicable to all parts of his dominions. And by 1 St. 4 G. 1, c. 9; 19 & 20 G. 3, c. 29; 23 & 24 G. 3, c. 38; & 36 G. 3, c. 48, all Foreign Protestants coming to settle in Ireland, on taking certain Oaths, are naturalized. Also by 1 St. 32 G. 3, c. 32, Mortgages may be made to Aliens, whether Friends or Enemies; but only so as to secure to them the benefit of the pledge by compelling a Sale of the Land, &c. and

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[(*a*) St. 4 & 5 W. 4, c. 92, for the abolition of fines and recoveries and the substitution of more simple modes of assurance, *in Ireland*, is precisely similar, *mutatis mutandis*, with the English Act, 3 & 4 W. 4, c. 74.] [66, n. *a*.]

not so as to allow their enjoyment of it as Real Property.

By 1 St. 2 G. 1, c. 6, Infant Trustees and Mortgagees may convey under the direction of the Irish Court of Chancery or Exchequer. And by 1 St. 5 G. 2, c. 8, Trustees and Mortgagees who are Idiots or Lunatics, or their Committees in their names, may convey by order of the Irish Chancellor. Both these Acts are amended by St. 7 G. 4, c. 43 (*a*).

By 1 St. 11 Ann. c. 3, where the lands of Infants are bound by any Agreement for the renewal of Leases of them for lives (which is a frequent mode of holding in Ireland) their Guardians are empowered to make the new Leases in their names under the direction of the Court of Chancery or Exchequer. If the Reversioner is a Feme Covert, beyond Sea, or *non compos*, a Master in Chancery is to execute the Instrument by order of the Chancellor. A counterpart is required from the Lessee (*b*).

[(*a*) These Acts are repealed by St. 1 W. 4, c. 60. See above, 204 n. *b*, 205 n. The powers given by this latter Act to the Courts of Chancery and Exchequer in England, extend to all the Queen's dominions except Scotland. (ss. 29, 30.) And like powers are given to the Courts of Chancery and Exchequer in Ireland, as to lands there. (s. 31.) The powers given to the Lord Chancellor of Great Britain in matters of Lunacy, &c., extend to all the Queen's dominions except Scotland and Ireland; and like powers are given to the Lord Chancellor of Ireland as to lands there. (s. 27.)]

[(*b*) The provisions of this Act were preserved by St. 1 W. 4, c. 65, (above 202, n., 203. n.) and none of the clauses of the latter Act as to surrenders and renewals of leases were to extend to Ireland; but now, by St. 5 & 6 W. 4, c. 17, St. 11 Ann. c. 3, is repealed, and the 16th and 19th sections of the 1 W. 4, c. 65, (except the concluding clause of the latter,) are made applicable to Ireland. As to the exercise of the powers of these two later Acts, in the several parts of the Queen's dominions, the provisions are similar to those of St. 1 W. 4, c. 60. (See the last note.)]

By 1 St. 28 G. 3, c. 35, Offices of the Courts of Equity are empowered, on Petition, to execute Conveyances in the names of any persons who by the Decrees of those Courts are bound to make such Conveyances to Purchasers.

By 1 St. 10 Car. 1, Sess. 3, c. 6, the concurrence of the Wife in certain Leases is required.

By 1 St. 2 Ann. c. 6, many disabilities, with respect to Real Property, were inflicted on Papists; but they are removed (except so far as concerns Advowsons and Borough Towns) on taking the Oaths prescribed by 1 St. 33 G. 3, c. 21.

By 1 St. 32 G. 3, c. 31, a licence of Mortmain from the King only is sufficient.

The Statute against Charitable Devises does not extend to Ireland.

By 1 St. 10 & 11 Car. 1, c. 3, all Grants of Church, Hospital, and College * Property (except † Offices) are made void; with a saving of Leases by Indenture, (of which a Counterpart must be entered in the Register Book of the Church, &c.) for a Term not exceeding twenty-one years, without permission of Waste, and with a Rent reserved ‡ equal to half the yearly value of the property. But these Leases must not include the Dwelling Houses used by the Incumbents for the most part of the last forty years, or the § Demesne Lands belonging to

* As to Property held in trust for a Parish, see 1 St. 37 G. 3, c. 44.

† As to Advowsons, see 1 St. 1 G. 2, c. 18.

‡ By 1 St. 35 G. 3, c. 23, it is sufficient if the Rent be not less than has been payable for the last twenty years.

§ By 1 St. 10 W. 3, c. 6, s. 7, Rectors, Vicars, Curates, &c. are prohibited from Leasing for more than one year, such parts of their Glebe as may be convenient to build Manse Houses on or to be occupied therewith.

See further 1 St. 15 G. 2, c. 5; 19 G. 2, c. 16; 53 G. 3, c. 92.

them. And all former Leases of the same property must be determined within one * year after the making of the new Lease For Houses in Cities and Corporate and Market Towns, the Term is extended to forty years; and wherever a previous long Lease is surrendered, a new Lease may, with the Licence of the Lord Deputy and Council, be made for sixty years (*a*).

By 1 St. 10 & 11 Car. 1, c. 2, s. 7, Leases and Charges, &c. of Benefices with Cure of Souls were to be valid only during residence without absence for more than eighty days in a year. But this part of the Act has been repealed by St. 5 G. 4, c. 91 (*a*).

The Husband's Power of Discontinuance of his Wife's Estate is taken away by 1 St. 10 Car. 1, Sess. 3, c. 6.

The two Statutes of Eliz. against fraudulent Conveyances are combined in the 1 St. 10 Car. 1, Sess. 2, c. 3.

By 1 St. 5 Geo. 2, c. 7, the interest of money is reduced to 6 per cent, nearly in the words of the English Statute (*b*).

The St. 53 G. 3, c. 141, (for Inrolment of Annuities,) does not extend to Ireland.

[See p. 607, n. *a*.] By 1 St. 6 Ann. c. 2, a Registry is established at Dublin for all Deeds and Wills relating to Lands in Ireland.

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* By 1 St. 35 G. 3, c. 23, this Condition, where neglected in Leases then already made, is dispensed with, but not as to future Leases.

By 1 St. 5 G. 2, c. 4, s. 4, Leases may be renewed without Surrender of derivative Leases.

[(*a*) St. 2 & 3 Vict. c. 18, (above, 238, n.,) and St. 6 W. 4, c. 20, (above, 217, n.,) do not extend to Ireland.]

[(*b*) St. 2 & 3 Vict. c. 37, and 3 & 4 Vict. c. 83, (above, 229, n.,) extend to Ireland.]

By 1 St. 10 Car. 1, Sess. 3, c. 6, Leases by Tenant in Tail, or in right of his Wife, for not more than forty-one years or three lives, are made valid on conditions similar to those in the English Statute.

The St. 55 G. 3, c. 147, with its amendments, extends to Ireland. See St. 7 G. 4, c. 66. There have also been Irish Statutes for the exchange of Church Property, as 1 St. 2 Ann. c. 10; 8 G. 1, c. 11; 15 & 16 G. 3, c. 17. And for charging on the Benefice part of the money laid out in building, as 1 St. 10 W. 3, c. 6; 12 G. 1. c. 10; 48 G. 3, c. 65; 49 G. 3, c. 103. And for the augmentation of Benefices, the 1 St. 10 & 11 Car. 1, c. 2, which enables the restitution of Impropriations; 1 St. 15 Car. 1, c. 11, which authorizes the Grant of ten acres for Glebe. See also 1 St. 8 G. 1, c. 12. And by 1 St. 1 G. 2, c. 15, Tenant in Tail in possession, and by 1 St. 3 G. 2, c. 12, Tenant for Life with immediate remainder to his issue, is empowered to make such grants as if he were Tenant in fee. See further 1 St. 31 G. 2, c. 11, and St. 4 G. 4, c. 86; 7 G. 4, c. 66.

[And see 4 & 5 W. 4, c. 92.]

By St. 50 G. 3, c. 33, Tenants in Tail, &c. are empowered to grant two acres of Land, (Irish Plantation Measure) for Schools. See further St. 53 G. 3, c. 107; 4 G. 4, c. 86.

By 1 St. 27 G. 3, c. 20, Tenants in Tail, or for Life, with immediate remainder to their issue, may make Leases for three lives, renewable for ever, of not more than fifteen acres Plantation Measure, not being part of their Demesne, to persons engaging to build on the ground, for the purpose of carrying on the Linen Manufacture.

By 1 St. 10 G. 1, c. 5, Ecclesiastics, Tenants for Life, &c. Guardians and Committees, are empowered to grant Leases of Mines, whether already opened or not, for thirty-one-years. And as to Coal Mines,

by 1 St. 23 G. 2, c. 9, the Term is extended to forty-one years. See further St. 46 G. 3, c. 71. More extensive Powers of leasing to the Royal Mining Company only are given by 1 St. 31 G. 3, c. 39.

By St. 56, G. 3, c. 55, Powers of Sale to the Directors of all Works relating to Inland Navigation are given to various limited proprietors.

By 1 St. 8 G. 1, c. 5, for the purpose of straightening boundaries, Lessces, with the concurrence of Reversioners, (entitled at least for their lives with remainder to their sons in tail male,) are empowered to make Exchanges, and grant perpetual Rent Charges for their equalization. But the lands exchanged are not to exceed two acres, Plantation Measure, for every one hundred perches, (of twenty one feet each) of the boundary line.

The General Inclosure Act does not appear to be adapted to Ireland, nor is that country included in the Land Tax Redemption Act.

By 1 St. 38 G. 3, c. 72, the Commissioners of the Treasury, with the consent of the Lord Lieutenant, are empowered to sell certain Rents and Lands of the Crown; but this Statute is in part repealed by St. 47 G. 3, Sess. 1, c. 16. See further 1 St. 39 G. 3, c. 33; and especially St. 7 & 8 G. 4, c. 68 (*a*).

By the Bankrupt Act of 6 G. 4. c 16, the Commissioners are empowered to dispose of the Bankrupt's Property in Ireland, as in all other parts of the King's Dominions. But it is provided that the Act shall not extended to Ireland, except where it is

[See p. 596, n. *a.*, *b.*]

[(*a*) See now St. 10 G. 4, c. 50, (noticed above, 486, n.,) which extends to Crown lands in England and Wales, Ireland, and the Isles of Man and Alderney.]

expressly mentioned. And the General Bankrupt Act now in force in that Country is the 1 St. 11 & 12 G. 3, c. 8, amended by 1 St. 19 & 20 G. 3, c. 25, and made perpetual by 1 St. 36 G. 3, c. 34 (*a*).

The Act for relief of Insolvent Debtors which is now in force in Ireland, is the St. 1 & 2 G. 4, c. 59, amended by 3 G. 4, c. 124, and continued for one year by 7 & 8 G. 4, c. 22(*b*).

By 1 St. 21 & 22 G. 3, c. 20, the lands of Accountants to the Crown are charged with their present and future arrearages, as in England. The specialty debts of the Ancestor to the Crown are also made a charge on the land in the hands of the heir, whether he take them by Descent or by Settlement; and the King is empowered to sell the Lands so charged by his Letters Patent. Further provisions on this subject are contained in 1 St. 25 G. 3, c. 53; which also directs a Commission to be issued from the Court of Exchequer to ascertain the debt, and makes an attested Copy of this Commission, and the Finding under it, conclusive evidence of the amount.

Chap. I.—Sect. 4.

The two Statutes of H. 8, relating to Wills, are combined in the 1 St. 10 Car. 1, Sess. 2, c. 2, and

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[(*a*) The former Acts relating to Bankrupts in Ireland are repealed, and the law amended and consolidated, by St. 6 W. 4. c. 14, (amended by St. 1 Vict. 48, and 2 & 3 Vict. 86.)]

[(*b*) The Act now in force, continuing the former law, and making further provision for the relief of insolvent debtors in Ireland, is the St. 3 & 4 Vict. c. 107. See too c. 105.]

the restrictions in respect of Tenure are removed by 1 St. 14 & 15 Car. 2, c. 19. The provisions also of the Statute of Frauds are contained in 1 St. 7 W. 3, c. 12. And the Statute relating to the credibility of Witnesses is copied in the 1 St. 25 G. 2, c. 11 (*a*).

Chap. I.—Sect. 5. (*b*)

[Sec 329, n.] The St. 54 G. 3, c. 145, for taking away Corruption of Blood in certain cases, seems, from its nature, to extend to all the King's dominions; as does the St. 11 & 12 W. 3, c. 6, for enabling descents to be derived through Aliens, with its amendment (*b*).

The provisions relating to Jointures are contained in the Irish Statute of Uses.

Chap. I.—Sect. 6.

By 1 St. 10 Car. 1, Sess. 2, c. 7, a Disseisin must be immediately followed by five years of quiet possession, or a subsequent descent will not take away the Entry of the person who has a right (*c*).

The Statutes of Limitations of H. 8 and Jac. 1, are incorporated in 1 St. 10 Car. 1, Sess. 2, c. 6;

[105, n. &c.] [(*a*) The late Act on Wills, St. 1 Vict. c. 26, extends to Ireland, and repeals the several enactments here referred to.]

[301, n. &c.] [349, n. &c.] [205, n.] [(*b*) The late Act on Dower, St. 3 & 4 W. 4, c. 105, and that on Inheritance, St. 3 & 4 W. 4, c. 106, would seem to extend to Ireland. And so too, it seems, does St. 4 & 5 W. 4, c. 23, as to Escheat and Forfeiture of Trust Estates.]

[370, n.] [(*c*) The late Act for Limitation of Actions, 3 & 4 W. 4, c. 27, extends to Ireland, except so far as relates to the right to permit to or bestow any Ecclesiastical benefice.]

but Actions grounded on the party's own Seisin are limited to twenty years. There is also a Saving of Church Property (*a*).

By 1 St. 8 G. 1, c. 4, where any Claimants of Lands, &c., or those under whom they claimed, had not been in possession within twenty years before the 12th of September 1721, they were required to sue within five years from that day, or from their right of Action accrued, or from the removal of disabilities: but the rights of the Crown were saved. These have not been subjected in Ireland to any general limitation until the St. 48 G. 3, c. 47, placed the two countries on the same footing in this respect (*a*).

The 1 St. 6 Ann. c. 10, s. 16, relating to Claims and Entries for avoiding Fines, &c. corresponds to the English Statute of 4 Ann. c. 16, s. 16 (*a*).

Chap. I.—Sect. 7.

The Land Tax Acts and Poor Laws have not been extended to Ireland (*b*).

The last General Stamp Act for Ireland, is the St. 66 G. 3, c. 56; the question whether this or the English Act shall be applicable, depends upon the situation of the Property, and not on the place where the deed is executed. See St. 1 & 2 G. 4, c. 55, and 3 G. 4, c. 117, s. 5 (*c*).

[(*a*) See preceding note.]

[(*b*) But see now, St. 1 & 2 Vict. c. 56, providing for the relief of the poor in Ireland, and imposing a rate on land for the purpose.]

[(*c*) By St. 7 & 8 G. 4, c. 55, the boards of stamps in Great Britain and in Ireland are consolidated; and by St. 4 & 5 W. 4, c. 60, the Commissioners of Stamps in Great Britain and Ireland, and

There is (it is believed) no Irish Statute relating to the Copies of Bargains and Sales.

By 1 St. 9 G. 2, c. 5, amended and made perpetual by 1 St. 1 G. 3, c. 3, the Recital of the Lease in the Release is in all cases sufficient evidence; and in pleading a Lease and Release, it is only necessary to produce the latter.

By 1 St. 35 G. 3, c. 12, Acts of Parliament commence their operation (unless otherwise provided) from the day of their receiving the Royal Assent, which is written on the Roll.

By 1 St. 35 G. 3, c. 39, Grants of Irish Lands by Patent under the Great Seal of England are declared to be as valid as if made under the Great Seal of Ireland.

By 1 St. 12 Eliz. c. 2, Exemplifications of Records, are of the same force as the originals.

[See St. 4 & 5 W. 4, c. 92, ss. 4—9.]

By 1 St. 10 Car. 1, Sess. 2, c. 10, Fines and Recoveries are not to be reversed for want of forms in words, &c.

[See St. 4 & 5 W. 4, c. 92.]

By 1 St. 4 G. 1, c. 10, Writs of Error for reversing Fines and Recoveries, must be brought within ten years from the completion, or five years from the removal of disabilities; and, by 1 St. 6 G. 1, c. 6, other Writs of Error, within twenty years from the Judgment, or five years from the removal of disabilities.

In Ireland the words Mountain, Bog, Town, Quarter, are good general descriptions. *Cottingham* v. *King*, 1 Burr. 623; *Massey* v. *Rice*, Cowp. 346.

By 1 St. 15 Car. 1, c. 6, all patents granted under

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the Commissioners of Taxes in Great Britain, are consolidated into one board of "Commissioners of Stamps and Taxes."

St. 1 & 2 Vict. c. 85, authorizes the using in any part of the United Kingdom, stamps denoting duties payable in Great Britain and Ireland respectively.]

Commissions of Grace are to be construed favourably to the Patentees.

The Irish Registry Act (1 St. 6 Ann. 1, c. 2, as amended by 1 St. 8 Ann. c. 10; 8 G. 1, c. 15; and 25 G. 3, c. 47,) agrees in general with the St. 6 Ann. c. 53, for the East Riding of Yorkshire. The difference relating to Equitable rights will be noticed in its proper place. The Act does not extend to Leases not exceeding twenty-one years, and attended with possession. The Register, it seems, ought to contain not only the date of the Deed, but the time of its being perfected (*a*).

Where a Will is contested, &c. it is not required that in the interim a Memorial of that fact should be registered. By 1 St. 8 Ann. c. 10, amended by 1 St. 8 G. 1, c. 15, a Certificate of the discharge of a Mortgage may be entered, to remain upon Record. And by the latter Statute, amended by 1 St. 25 G. 3, c. 47, the Registrar is directed to give Negative Certificates, specifying all and the only Instruments which appear on the Register during any given period (*b*).

Where deeds relating to Irish Property are executed in Great Britain, the mode of registering them at Dublin is now regulated by St. 3 G. 4, c. 116.

By 1 St. 5 G. 2, c. 4, s. 10, no Instrument by a Tradesman, charging any of his effects after his death for his Widow or Children, shall be valid against Creditors, unless registered in four months.

By 1 St. 33 G. 2, c. 14, Conveyances by Bankers

[(*a*) See now, St. 2 & 3 W. 4, c. 87, containing important and apparently useful regulations for the numbering and filing of the memorials, and the keeping of alphabetical indexes of the persons and lands affected, and for the fitly describing of the lands in the memorial.]

[(*b*) See 2 & 3 W. 4, c. 87, s. 27.]

(except Leases for not more than three lives or thirty-one years at Rack-rent) are void against Creditors, unless registered within one calendar month, or if executed out of Ireland, within three.

By 1 St. 26 G. 3, c. 2, Freeholds do not give the right of voting for the representation of the County, unless registered with the Clerk of the Peace six calendar months before the election. See further St. 57 G. 3, c. 131; 4 G. 4, c. 36 & 55.

There seems to be no Legislative provision for Parish Registers in Ireland.

CHAP. II.—SECT. 1.

[See 3 & 4 W. 4, c. 27.] The limitation of Formedon to twenty years, is contained in the 1 St. 10 Car. 1. Sess. 2, c. 6.

CHAP. II.—SECT. 2 (*a*).

By 1 St. 6 Ann. c. 10, s. 19, Warranties by Tenant for Life, and Collateral Warranties by an Ancestor having no estate of inheritance in possession, are made void against the Heir.

By 1 St. 21 G. 2, c. 11, the Tenant to the Præcipe may be created at any time during the Term. And by the same Statute, as also by 1 St. 8 G. 1, c. 6, s. 12, Leases for Lives, with Rent reserved, are no obstacle to the recovery. The 1 St. 21 G. 2, c. 11, also contains provisions similar to those in the English Act, to supply the loss of the Deed or of the Recovery Roll; but future Deeds, to be evidence

[(*a*) Fines and Recoveries in Ireland are abolished, and more simple modes of assurance substituted, by St. 4 & 5 W. 4, c. 92. The provisions are similar to those in the English Act, 3 & 4 W. 4, c. 74.]

of a Recovery, must be acknowledged before a Justice of the Court of Common Pleas, and inrolled there.

By 1 St. 10 Car. 1, Sess. 2, c. 8, a Fine, with Proclamations by Tenant in Tail, bars the Entail as in England. The English Statute of 11 H. 7, c. 20, against the Widow's alienation, is also made an Irish Law; and the Act does not extend to Gifts from the Crown.

By 1 St. 10 Car. 1, Sess. 3, c. 6, Tenant in Tail may make leases for 41 years or three lives, under the like conditions as in the English Statute.

Chap. III.—Sect. 1.

The 1 St. 7 W. 3, c. 12, contains the provision of the Statute of Frauds relating to Estates *pur autre vie* (*a*).

By 1 St. 7 W. 3, c. 8, if the *cestui que vie* be beyond sea, or absent himself within the Realm, for seven years, he may be presumed dead, if no proof to the contrary; but if he return, the Tenant is to be reinstated, and recover the mesne profits.

By St. 7 G. 4, c. 29, some general restraints are imposed upon Assignments and Demises by Lessees.

Chap. IV.—Sect. 1.

The 1 St 8 Ann. c. 4. is identical with the English Statute for vesting Remainders in posthumous children.

[(*b*) This provision is repealed by St. 1 Vict. c. 26. See p. 604, n. *a*.. and see 287, n.]

CHAP. V.—SECT. 1.

By 1 St. 10 Car. 1, Sess. 2, c. 4, Covenants and Conditions, between Landlord and Tenant, are made to run with the Land on both sides.

By 1 Stat. 17 & 18 Car. 2, c. 11, made perpetual by 1 St. 7, W. 3, c. 7, Extents are not to be avoided because part of the Land which was liable has been omitted; but the right of contribution between its several owners is saved. See further 1 St. 26 G. 3, c. 31.

[See 3 & 4 V. c. 105, s. 32.] By 1 St. 8 G. 1, c. 4, the lapse of twenty years since the last payment of interest, &c. is made a bar to actions and suits on Bond, Judgment, Statute, or Recognizance.

By 1 St. 8 G. 1, c. 6, s. 8, Officers of the Four Courts at Dublin are directed to give Negative Certificates of Judgments, Statutes and Recognizances, and made answerable for their accuracy.

The provisions of the Statute of Frauds relating to Judgments, Executions, &c., are contained in 1 St. 7 W. 3, c. 12; and as to Dockets, see 1 St. 3 G. 2, c. 7, made perpetual by 1 St. 13 & 14 G. 3, c. 42(*a*).

[3 & 4 Vict. c. 105, s 76.] By 1 St. 9 G. 2, c. 5, and 25 G. 2, c. 14, both made perpetual by 1 St. 11 & 12 G. 3, c. 19, Assignees of Judgments and Statutes (the Assignment being entered on the Roll) may sue execution, or bring Actions of Debt, in their own names.

By 1 St. 21 & 22 G. 3, c. 20, all obligations concerning the King are to have the effect of Statutes

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[(*a*) St. 3 & 4 Vict. c. 105, s. 19, &c. contains enactments for Ireland, as to judgments, decrees, rules, and orders of Courts of Law and Equity, similar to those contained for England, in St. 1 & 2 Vict. c. 110. See above, 873, n., &c.]

Staple; but the lands of the Obligors, when they come into the hands of other persons, are to be liable "wholly and entirely and in no ways severally." The lands of Accountants to the Crown are also made liable as by Statute Staple from their entry upon office, &c. (*a*).

The 1 St. 4 Ann. c. 5, answers to the English Statute of Fraudulent Devises.

CHAP. V.—SECT. 3.

The provisions of the Statute of Frauds relating to Nuncupative Wills are contained in the 1 St. 7 W. 3, c. 12 (*b*).

The principal enactments of the English Statutes of Distribution are contained in 1 St. 7 W. 3, c. 6.

By St. 58 G. 3, c. 81, Probate is not to be granted, by the Ecclesiastical Courts in Ireland to an Executor while under twenty-one years of age.

CHAP. VI.—SECT. 1.

By 1 St. 14 & 15 Car. 2, c. 10, Military Tenures are abolished, and Testamentary Guardianships introduced. [382, n.]

By 1 St. 10 Car. 1, Sess. 2, c. 6, Avowries are limited to 40 years.

CHAP. VI.—SECT. 2.

By virtue of several Statutes, the remedies for recovery of Rents in Ireland are now almost in all particulars the same as in England. In some re-

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[(*a*) St. 2 Vict c. 11, for protection of purchasers against crown debts, &c., does not extend to Ireland.] [253, n.]

[(*b*) These provisions are repealed by St. 1 Vict. c. 26. See p. 604, n. *a*.]

spects indeed the former country has the advantage. Thus by 1 St. 25 G. 2, c. 13, where the double value, to be exacted from a Tenant who continues his occupation after Notice to quit given to him, is under 20*l.*; and by St. 56 G. 3, c. 88, amended by St. 58 G. 3, c. 39, & St. 1 G. 4, c. 41, where the Rent is under 50*l.* and a whole year's Rent is due; the amount may be recovered by the summary process of Civil Bill. And by 1 St. 8 G. 1, c. 2, upon Ejectment against a Tenant for non-payment of Rent, a Mortgagee of the Lease, though not in possession, if he do not pay the arrears and costs within nine months, is barred; also by 1 St. 5 G. 2, c. 4, the Landlord may bring Ejectment wherever a year's Rent is due, though there be no Clause of Re-entry in the Lease. And by 1 St. 25 G. 2, c. 13, he may either distrain or bring Ejectment, though the Tenant's possession be not referable to an actual Demise. Provision is made for relief against unlawful or excessive Distresses by St. 7 & 8 G. 4, c. 69(*a*).

By 1 St. 6 Ann. c. 10, and 1 G. 2, c. 8, the Law of Attornments is reduced to the like state as in England.

The clauses relating to Rents in the Statute of Uses are contained in 1 St. 10 Car. 1, Sess. 2, c. 1.

Chap. VI.—Sect 4

By 1 St. 28 G. 3, c. 29, the Tithes of Hemp are fixed at 5*s.* per acre.

By 1 St. 33 G. 3, c. 25, Barren Land is exempted from Tithe for seven years after improvement.

[(*a*) St. 3 & 4 Vict. c. 105, s. 32, contains the like limitations
[1058, n.] of actions of debt on specialties, &c. for Ireland, as St. 3 & 4 W. 4,
[1060, n.] c. 42, s. 3, does for England; and ss. 61, 62, of the Irish Act, give the like powers as ss. 37, 38 of the English Act, for the recovery of arrears by the executors of the lessor.]

By St. 54 G. 3, c. 68, for Ireland, Tithes not exceeding 10*l.* or in the case of Quakers, 50*l.* may be recovered by summary process. This Act also regulates the proceedings of Ecclesiastical Courts, and limits Actions for Tithe to six years.

By 1 St. 28 H. 8, c. 16, the Lands, Tithes, &c. of certain Religious Houses are given to the King.

By 1 St. 33 H. 8, Sess. 2, c. 5, the property of other Abbeys, &c. and of the Knights of St. John, is given to the King; and here the Clause for the continuance of exemptions from Tithes is introduced.

By 1 St. 14 & 15 Car. 2. c. 10, provision is made for the union or division of Parishes in certain cases. See further 1 St. 2 G. 1, c. 14. See also St. 6 G. 4, c. 99, and particularly 7 & 8 G. 4, c. 43.

By 1 St. 33 H. 8, c. 14, Commissioners are appointed to erect Vicarages, where Appropriations have been given to the Crown.

By 1 St. 33 H. 8, c. 12, Laymen may sue for Tithes in the Ecclesiastical Courts, and the Title to them is made the subject of a Real Action.

As to Leases of Tithes by Ecclesiastical Persons, see St. 3 G. 4, c. 125.

By St. 4 G. 4, c. 99, amended by St. 5 G. 4, c. 63, public provisions are made for the establishment of Compositions for Tithes. See further St. 7 G. 4, c. 62; and 7 & 8 G. 4, c. 60 (*a*).

The 1 St. 2 G. 1, c. 15, contains a Confirmation of

[(*a*) These Acts were amended by St. 2 & 3 W. 4, c. 119, (itself amended by St. 3 & 4 W. 4, c. 100,) wherebya fixed composition for tithe was established generally throughout Ireland.

And by St. 1 & 2 Vict. c. 109, (amended by St. 3 Vict. c. 13,) these compositions are abolished, and rent-charges, variable with the average price of corn, substituted in lieu thereof.

As to prescriptions or claims of modus or exemption, see s. 18, &c. The provisions are similar to those of the English Act, [1189, n.]
2 & 3 W. 4, c. 100.]

Letters Patent of Q. Anne, by which the First Fruits are granted to Trustees, and the *Twentieths* released to the Clergy. See further 1 St. 10 G. 1, c. 7; 29 G. 2, c. 18; St. 4 G. 4, c. 86.

Chap. VI.—Sect. 5.

By 1 St. 1 G. 2, c. 23, made perpetual by 1 St. 13 G. 2. c. 4, Usurpation does not displace the Right to an Advowson.

I have not found any Statutes of the Irish Parliament relating to Simony, excepting a Clause in 1 St. 10 & 11 Car. 1, c. 2, s. 7, which makes void all Bonds, &c. for Resignation: and does not appear to be included in the Repeal by St. 5 G. 4, c. 91.

Chap. VII.

In the 1 St. 14 & 15 Car. 2, c. 19, for converting Tenures into free and Common Socage, Copyholds are excepted; but they are seldom elsewhere mentioned in the Irish Statute Book.

Chap. VIII.—Sect. 1.

It has already been stated that the provisions of the Statute of Frauds, and of the Statutes of Distribution have been adopted in Ireland.

By 1 St. 19 & 20 G. 3, c. 30, where Tenants under Leases for lives are entitled, by virtue of the Covenants, to perpetual renewals on payment of certain Fines, &c. the neglect to tender such Fines, in the absence of Fraud, is not to bar the Equitable Right to such renewal.

[See 4 & 5 W. 4, c. 92, ss. 62—64.]

By St. 58 G. 3, c. 46, an Estate Tail in Money directed to be laid out in Land may be barred by Petition, &c.

Chap. VIII.—Sect. 2.

It is the common practice in Ireland, on a Suit for Foreclosure of a Mortgage, to order a Sale; which explains the 1 St. 32 G. 3, c, 32, for enabling aliens to be Mortgagees. See 13 V. J. 205, *ante*, p. 597.

Chap. VIII.—Sect. 3.

The Clauses of the Statute of Frauds here mentioned are also in the Irish Law.

The Irish Registry Acts, by directing that Instruments duly registered, "shall be deemed and taken "as good and effectual both in Law and Equity according to the priority of time of registering," &c. has deprived the purchaser of the Legal Estate of any benefit which he might otherwise claim from want of Notice of Equitable Charges which have been registered before his own Conveyance (*Bushell* v. *Bushell*, 1 Scho. and Lefr. 90), than which indeed nothing can be more reasonable; for it is his own fault if he neglect to search the Register. [St. 2 & 3 W. 4, c. 87.]

The West Indies.

The following notes of the Laws of our West Indian Colonies are principally extracted from the valuable work of Mr. Howard lately published, which is intituled "The Laws of the British Colonies in the "West Indies and other parts of America concern-

"ing real and personal property and manumission of "slaves, with a view of the constitution of each "colony (a)."

Jamaica.

THIS Island was captured by the English in 1655, but being thereupon deserted by the former inhabitants, it seems to be more properly considered as a Colony than as a conquest; see 4 Burr. 2500; Cowp. 212. By an Act of Assembly of 1 G. 2, c. 1, s. 22, it is declared "that all such laws and statutes "of England as have been at any time esteemed, "introduced, used, accepted or received as laws in "this Island shall be and continue laws of this His "Majesty's Island of Jamaica for ever." It has a *Supreme Court* of Law, with other subordinate Courts. A Court of Chancery is held by the Governor, and also a Court of Ordinary for Ecclesiastical matters. The Governor and Council also constitute a Court of Error, which receives appeals from the Supreme Court; and, as in other Colonies, appeals (under certain restrictions) may be made in the last resort to the King in his Privy Council.

By an Act of Assembly of 33 Car. 2. c. 12, "A "Deed in due form of law made, and within three "months after the date thereof acknowledged by the "party or parties that grant the same, or proved by "the oath of one sufficient witness or more, before the "Governor or some one of the Judges of the Courts

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[(b) The reader must also be referred to the late valuable work of Mr. Burge, intituled "Commentaries on Colonial and "Foreign Laws generally, and in their conflict with each other, "and with the Law of England." 1838.]

" of this Island, and the same recorded at length in " the Office of Enrolments " at St. Jago de la Vega, within the three months, shall be valid without livery or other ceremony. A Deed without such acknowledgment or proof and enrolment, is made insufficient to pass Freehold, or to grant a Lease for above three years. Deeds made out of the Island may be recorded within six months after their arrival. By 10 Ann. c. 4, and 60 G. 3, c. 23, s. 3, the Secretary is to record the Deed within ninety days after it has been brought to the Office, and indorse upon it the day of its coming to his hands, which shall be considered the day of Enrolment. By 4 G. 2, c. 5, s. 2, the Enrolment is as good evidence as the Original; and this provision extends to Wills " duly executed according to law, and proved before " the Governor and Commander in Chief by one or " more of the subscribing witnesses thereto." By s. 3, an Exemplification under the seal of an Archbishop, (attested as such and afterwards enrolled or recorded in the Island,) of any Will after Probate, is made good evidence of title to any lands, tenements, hereditaments or estate whatsoever under the Will. By s. 5, future Deeds made within the Island must be recorded within ninety days from the date, or will be void against subsequent purchasers or mortgagees, though not against the Grantor or his heirs. By s. 7, Deeds executed out of the Island, must be recorded within six (altered by 16 G. 2, c. 5, to twelve) calendar months from the date, and within ninety days from the arrival of the ship which brings them.

By 24 G. 2. c. 9, Deeds executed in Great Britain, Ireland, &c. may be proved or acknowledged before the Chief Magistrate of any City or Town Corporate there, and certified under its Common Seal.

By 33 Car. 2, c. 22, s. 3, all Bills of Sale and Con-

veyances made by Husband and Wife, and acknowledged before the Judge of any Court of Record within the Island, and duly recorded, shall have the same effect as if the lands or tenements had passed by Fine and Recovery in any of His Majesty's Courts of Westminster. By 2 Ann. c. 7, s. 15, the acknowledgment for this purpose may be made before the Mayor of any City in England or Ireland.

By 10 Ann. c. 12, all Conveyances for valuable consideration (unless made by infants or persons of nonsane memory) to have the effect of Fine and Recovery.

By 8 G. 1, c. 5, Partitions between Joint-tenants, Tenants in Common, and Coparceners, are facilitated.

By 4 G. 2, c. 4, seven years' peaceable possession of Lands, Tenements*, Negroes or Hereditaments by virtue of any Deed, Will or Conveyance, or of any Patent for which quit-rent has been paid for twenty years or from its date, (though the Patent or the Assignment of it be lost), or by virtue of any Order, having paid quit-rent for the like time, is made an absolute bar to all claims, except the claims of Infants, Femes Covert and persons of unsound memory, which shall be made within three years after removal of their disabilities. But the possession of Trustees, Mortgagees, Guardians, Attornies, Lessees and Tenants of Particular estates, is entirely excepted out of the Act. This Act is explained by 14 G. 3, c. 5; and see as to the construction of it, *Beckford* v. *Wade*, 17 V. J. 47.

By 24 G. 2, c. 19, sales of Land by the Provost Marshal, upon executions for debt, are regulated. By s. 10, Interest is reduced to six per cent. By s. 12, all loans from residents in Great Britain to

* As to Slaves purchased at a Marshal's Sale, see 23 G. 3, s. 13.

residents in Jamaica are made to bear interest at five per cent, independently, (as it seems,) though not in derogation, of any stipulation on the subject. It appears that the enactment was intended to be prospective as well as retrospective.

By 16 G. 3, c. 14, reciting doubts to have arisen whether slaves could be devised by Will not executed according to the Statute of Frauds, such devises formerly made, and being duly enrolled, are confirmed; but for the future, the form of that Statute is directed to be followed. This Act seems to imply a recognition of the Statute of Frauds as the Law of Jamaica, which it may be by virtue of the Act of 1 G. 2, c. 1, and the antecedent practice of the Courts. But it is observable that the Act of 4 G. 2, c. 5, s. 3, which makes the exemplification of a Will under the Archbishop's seal evidence in questions of real property, is not perfectly consistent with this supposition. [See p. 594, n. *a*.]

By 29 G. 3, c. 13, Bonds, Mortgages, Judgments, &c. on which no payment shall be made for 20 years, are declared void, with a saving in respect of disabilities.

By 37 G. 3, c. 13, certain Stamp Duties are imposed on Deeds, whether executed in the Island or elsewhere; and if the full consideration be not stated the Deed is void.

By 50 G. 3, c. 21, Slaves may be sold by Executors or Administrators, where other goods and chattels are not sufficient for satisfying debts and legacies; but the remaining Slaves " shall be judged, deemed " and taken as inheritance, and shall accordingly de- " scend." The offspring of the Slaves of Tenants for life, &c. to remain or revert as their Parents. The Wife's Dower in Slaves may be barred by a simple alienation by the Husband. Books to be kept in the several Parishes for Transfers of Slaves. [See p. 594, n. *a*.]

Barbadoes.

This Island was colonized from England in 1624 or 1627. It has a Court of Chancery, Courts of Common Pleas, a Court of Ordinary, a Court of Appeal and Error, and other jurisdictions.

By an Act passed in 1653 (during the Commonwealth) Deeds attested to have been proved upon oath under the Corporation Seal of any City or Town Corporate within the dominions of England, may be given in evidence, as if the witnesses were present.

An Act of 1661 regulates Sales of Land by the Marshal.

Another Act of 1661 confirms some former Acts; making a Deed enrolled within three months sufficient to convey any freehold or inheritance without further ceremony; and making the enrolment * indispensable. Also enabling married women to convey their estates by Deed, upon acknowledgment and examination before the † Governor or any Chief Judge in the Island; and making a Fine levied in England and entered on Record in the Island effectual for the same purpose. A period for limitation of Actions is prescribed, *viz.* two years after title accrued, or one year from removal of disabilities; this however may be thought to relate only to titles under Settlements, &c. made prior to the Act, (but see 5 G. 2, c. 2) But by a clearly prospective clause, s. 9, a quiet ‡ possession for five years is pleadable against all § claims

* This requisition is extended to the case of Slaves by 39 G. 3.

† Or any of his Majesty's Judges, or the Mayor of any City or Corporation in England, &c. the Deed being recorded in the Island within twelve months: by an Act of 1670.

‡ This is extended to Slaves by 8 Ann. ss. 27, 28.

§ By an Act of 1670 no claim can be effectual unless made by Action; and one Trial is to be conclusive.

except in cases of Coverture, infancy and unsound memomy, or where the possession has been held by the Attorney or Tenant, Servant or Overseer, of the demandant, or by virtue of some Particular Estate. By s. 8, the right to Dower is confined to property of which the Husband dies seised.

An Act of 1668 restricts interest to ten per cent, which by an Act of 1752 was ultimately reduced to six per cent.

Another Act of 1668 makes Negro Slaves Real Estate, but by one of 1672 they are declared to be Chattels* for the payment of debts, and recoverable by Personal Actions.

An Act of 1669 makes notice of an unregistered Deed binding on a subsequent Purchaser.

Two Acts, one of 13 Anne, and the other intituled of 19 Anne, contain the substance of the English Statutes of Distribution, and that relating to Testamentary Guardians.

By 5 Geo. 2, Mortgages, Judgments, Bonds, &c. on which no payment shall have been made for twenty years, are made void, unless kept on foot to attend the inheritance, &c.

An Act of 9 Geo. 2, authorizes the Assignment of Debts; if married women are necessary parties to the Assignment, they must be duly examined.

2 Geo. 3, contains the principal provisions of the Statute of Frauds; and Exemplifications of Wills are to be " deemed and taken as proof of the Ori- " ginal Will to all necessary legal and equitable pur- " poses."

2 Geo. 4, for relief of Insolvent Debtors, vests their property, upon their discharge from Custody, in the Remembrancer of the Court of Exchequer.

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* Lands of inheritance seem also to be chattels for payment of debts. See 19 Geo. 2. See also 4 Mod. 226.

Grenada.

This Island was captured by the English in 1762, and received the English Law, so far as might be suitable to its condition, from the King's Proclamation in 1763. *Campbell* v. *Hall*, Cowp. 204; *Attorney-General* v. *Stewart*, 2 Meriv. 143. The Governor sits as Chancellor; and there is a *Supreme Court of Judicature*, a Court of Error, a Court of Ordinary, and some other Courts.

By an Act of 7 Geo. 3, Interest is reduced to six per cent.

By another Act of the same year, Purchases made by the King's subjects are confirmed, and all claims against them not prosecuted before 10th February 1768, (unless recognized in the Purchase Deed) are barred.

By another Act of 7 Geo. 3, (amended by 10 G. 3,) all Deeds relating to Lands or Tenements in Grenada or the Grenadines, are to be recorded, or will be void against subsequent Purchasers or Mortgagees. Deeds made in Europe, and recorded within twelve months, have the same effect as if recorded immediately. If made in Great Britain or Ireland,* they may be acknowledged or proved before the Chief Magistrate of a City or Town Corporate, and transmitted under the Seal of the Corporation. Femes Covert being parties are to be examined, and the examination indorsed, and the Deed to have the effect of †Fine and Recovery.

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* See further 31 Geo. 3, s. 38.

† By 24 Geo. 3, an acknowledgment before a Justice of the Court of Common Pleas in Grenada, England, or Ireland, is required; and the operation of such Deeds is expressly extended to Estates Tail.

Wills* of Lands or Tenements not to be pleaded or admitted as evidence, until proved before the Governor or other person having power to take Probate, and recorded. Copies of recorded Deeds and Wills may be pleaded and given in evidence as originals. The time of entry, indorsed by the Registrar, to be deemed the time of registry.

By another Act of the same year, "all Negroes and "other Slaves in these Islands, and also the horned "cattle, horses, mules, and asses, commonly used, "employed and worked upon and about any Planta- "tion or Plantations, and all coppers and stills and "other plantation utensils, are declared real estate "of inheritance, and affixed to the Freehold," &c. Slaves without Land are also made to descend to the Heir, and subject to Dower. Some expressions however are used which seem to indicate an opinion that the right of Dower depends upon the husband dying seised. If a third part in value of the Husband's estate be devised to the Widow, though not expressed to be in bar of dower, she must make her election. Deeds relating to Slaves to be recorded as those concerning Land. By 10 G. 3, this Act is amended, the Slaves and Stock being made subject to the debts of the deceased, for which purpose they may be inventoried by the Executors or Administrators. And the Widow is not to have Dower of any Slaves, Stock or Utensils of her Husband, which have been sold by the Provost Marshal for payment of his debts, or by virtue of any Judgment or Decree. This clause may be thought to correct the language of the former Act relating to Dower.

By another Act of 10 G. 3, (for removing doubts) the Statute of Frauds is declared to be in force in Grenada and the Grenadines.

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* By 31 Geo. 3, s. 40, English Probates are made *primâ facie* evidence.

By an Act of 24 G. 3, Sales decreed by the Island Court of Chancery may be effected by the Registrar of the Court, acting in the name of the Defendant who ought to make the conveyance.

By another Act of 24 G. 3, Mortgagors are prohibited from Selling their Slaves apart from the Plantation, (except in certain cases) without consent of the Mortgagees, on pain of forfeiture of the Equity of Redemption. The rest of the Act relates to sales by the Marshal of the Equity of Redemptiou of mortgaged Slaves, and contains provisions for preserving the rights of the Mortgagee.

31 G. 3, among other things, enacts in s. 56, that Judgments shall be docketed. Executions to bind goods, chattels, and slaves, only from time of lodgment in the Marshal's Office. The Act contains also many regulations of Marshal's Sales; extends the power of sale to trust Estates; annuls fraudulent conveyances; adopts the English Statute of Fraudulent Devises; and enables the Marshal by conveyance in the lifetime of the debtor, to dispose of his estate tail as by Fine or Recovery.

By 53 G. 3, all reasonable and necessary supplies made to a Plantation, and other expenses bestowed upon it, within eighteen months previous to a sale or other change of property, are charged upon the new proprietor: and the like expenses incurred within eighteen months before the death of the proprietor, are made a primary charge upon the estate.

By 59 Geo. 3, seven years of peaceable possession unless by virtue of a Particular Estate, &c., are made a bar to all claims unless asserted within the following periods, from the date of the Act, or removal of disabilities; if the claimants reside in the West Indies, within twelve months; if in North America, within eighteen months; if in Europe, within two years; if in Africa or the East Indies,

within three years. And all securities dormant for twenty years are made void.

St. Vincent.

This island became subject to English Laws in the same manner as Grenada. It has a Court of Chancery, a Court of King's Bench, and Common Pleas, a Court of Error and Appeal, a Court of Ordinary, &c.

By 7 G. 3,* Slaves are made Real Estate, but with a Power to Executors and Administrators to inventory them for payment of debts; and also, in order to prevent a sale of the Slaves, to charge the amount of debts; and legacies which they may have paid, upon the Plantation.

By another Act of 7 G. 3, a Deed executed by husband and wife, and acknowledged before a Justice of the Court of Common Pleas in England, Ireland or St. Vincent, is made equivalent to a Fine or Recovery: provided that the Wife be examined, and her examination, with the acknowledgment, indorsed upon the Deed, and subscribed by the Judge; and the Deed be enrolled in the Register's Office in the Island within six months, and if made in England or Ireland, then in the Court of Chancery of that kingdom.

By 10 G. 3, all deeds and instruments (except Wills) relating to Lands, Slaves, &c., to be acknowledged before the Registrar, if executed in St. Vincent, within thirty days; if in Grenada, the Grenadines, Tobago, Dominica, or Barbadoes, within three Calendar Months; if in the Leeward Caribbee Islands, within four Calendar Months; if elsewhere in His Majesty's dominions, within twelve Calendar Months

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* By 1 G. 4, this Act is repealed, and a temporary Act to the like effect substituted. [See p. 594, n. *a*.]

from the date; and thence to be as valid as if registered on the day of the date. In case of accident in crossing the sea, two years are allowed; with these exceptions, Deeds, &c. to be valid against subsequent purchasers or incumbrancers only from the time of acknowledgment. Parties may appoint Attornies to acknowledge the Deed; which, with the Power of Attorney, must then be proved before some Justice of Common Pleas in St. Vincent, or the Chief Magistrate of some City, or Town Corporate, &c. and certified under the hand of the former, or seal of the latter. No Will concerning Realty to be evidence till proved before the Governor, &c. and entered at large in the Registrar's Office. Copies of Deeds and Wills, (with an exception as to leases,) attested by the Registrar, to be as good evidence as Originals. Recorded Deeds to operate without Livery. The Act also contains provisions for the registration of Deeds previously made.

By 26 G. 3, Probates of Wills are *primâ facie* evidence; Judgments are to be docketed; and Marshal's Sales to be made as there directed. By 55 G. 3. the Conveyance upon any such Sale may be made by the Marshal's successor in office.

By 32 G. 3, Interest is not to exceed six per cent.

Dominica.

This Island also received the English Laws by the Proclamation of 1763. Among other Courts, it has a Court of Chancery, a Court of Common Pleas, a Court of Error, and a Court of Ordinary.

By Acts of 10 G. 3, 12 G. 3, and 14 G. 3, all* Conveyances, &c. of Lands, Tenements, or Slaves, are made void as against subsequent Purchasers or Mort-

* As to Letters of Attorney, see 58 G. 3.

gagees, unless recorded within three months after execution, if made in Dominica; if in any of the neigbouring Islands, then within six months; and if in North America, Jamaica, or Europe, (except in case of accidents at sea,) within twelve months; but deeds made before the Act of 12 G. 3, are allowed to be afterwards recorded; and further provision is made by 14 G. 3, for Deeds already made. The usual form of acknowledgment or proof before a Chief Magistrate, &c. is required. Femes Covert to be examined by the same persons, and the examination indorsed, upon which the Deed to have the effect of a Fine and Recovery. Wills not to be pleaded or admitted as evidence till proved and recorded. Copies attested by the Registrar to be as good evidence as Originals. Time of entry to be indorsed, and taken for time of registry. Recorded Deeds to have the effect of Livery.

By 16 G. 3, Interest is reduced to six per cent.

By 43 G. 3, Provision is made against the holding of Real Property by Aliens.

By another Act of 43 G. 3, Exemplifications and Probates of Wills are made *primâ facie* evidence, but not so as to alter the forms required by law for devises of Real Estates; the Act also contains other provisions relating to evidence of Deeds, and copious regulations of Sales by the Marshal. From the tenour of this Act it would appear that Slaves are considered as personal estate. [See p. 594, n. *a*.]

By 3 G. 4, Tenant in Tail, by Motion in the Court of Common Pleas, may obtain a Rule enabling him to bar the entail by Deed.

Tobago.

This Island appears also to owe its English Laws to the Proclamation of 1763; it has Courts (among

others) of Chancery, of Common Pleas, of Ordinary, and of Error.

By an Act of 8 Geo. 3, the rate of interest is reduced to eight per cent, and by an Act of 15th March 1794, is further reduced to six per cent.

By an Act of 8 G. 3, amended by 13 G. 3, all conveyances and instruments relating to lands or tenements shall be duly entered and recorded in the Registrar's Office within two months after their execution, if made in Tobago; within six months, if made in any of the neighbouring Islands; within nine months, if in North America; and within fifteen months, if in Jamaica or any part of Europe; or otherwise shall be void against *bonâ fide* purchasers for valuable consideration, and creditors who shall have recorded their Mortgages, &c. in time and without notice. A saving is introduced for Deeds lost at sea or otherwise intercepted. The Deed, if made in Great Britain, &c. to be acknowledged or proved before the Chief Magistrate of any City or Town Corporate, and transmitted under the seal of the Corporation. If a Feme Covert be party, she is to be privately examined, and her examination indorsed and attested by such Chief Magistrate, &c.; and then the Deed to have the effect of Fine and Recovery against her. Wills relating to Lands and Tenements must be proved before the Governor in Chief, &c. and recorded. Office Copies of recorded Deeds and Wills may be pleaded, and are as good evidence as originals; the Time of Entry in the Registrar's Office to be indorsed on the Instruments, and to be considered as the time of Registry.

By another Act of 8 G. 3, Slaves are made Real
[See p. 594, n. *a*.] Estate: as also the * Mules belonging to any Plantation; and all boilers, stills, and still-heads, and

* To these, by 2 G. 4, are added Horn Cattle, Horses and Asses.

other Plantation Utensils belonging to Mills, Boiling Houses, and Still Houses; and Deeds and Instruments relating to Slaves are subjected to the Registry Act.

By 15 G. 3, s. 34, British Probates of Wills, being recorded in the Secretary's and Registrar's Offices in the Island, are *primâ facie* evidence of devises of realty. The Act also contains many regulations relating to Executions and Sales by the Marshal.

By 52 G. 3, Supplies, &c. afforded to any Plantation within twelve months previous to any change of property are made a charge upon the estate. And by 3 G. 4, this charge is made to take precedence of all others under certain conditions.

The Bahamas.

These numerous small Islands were colonised by the English in 1666. They have a Court of Chancery, a *General Court* of Law, a Court of Error, a Court of Ordinary, and several other Courts.

By an Act of 4 G. 3, c. 1, amended by 46 G. 3, c. 16, and 2 G. 4, c. 36, all Deeds and Conveyances affecting lands, tenements, or hereditaments, negroes, vessels, or other estate, may at the election of the parties, be registered and recorded, so as to give the usual advantages: and, as to lands, tenements, or hereditaments, and *negroes, the Deed first registered, being for good or valuable consideration, shall have priority. The time of Registration to be indorsed on the Deed. Certificates of satisfaction of Mortgages, Judgments, &c. may be entered in the Register. Deeds executed in Great Britain, &c. acknowledged before the Chief Magistrate of any City or Town Corporate, and transmitted under the Com-

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* Slaves however seem to be personal property. [See p. 594, n. *a*.]

mon Seal, may be recorded without further proof. Office Copies as good evidence as originals.

By 40 G. 3, c. 2, the English Statutes in force within these Islands are ascertained. See also 50 G. 3, c. 4.

By 41 G. 3, c. 3, legal Interest is reduced from eight to six per cent.

The 45 G. 3, c. 21, regulates executions and sales by the Marshal. And in s. 16, empowers the Judges of the General Court to appoint Commissioners in Great Britain, &c. for taking the examinations and acknowledgments of married women in order to bar their right of dower by Deed.

By 51 G. 3, c. 15, a Deed by Husband and Wife, acknowledged before any of the Justices of the King's Bench or Common Pleas in England or Ireland, &c. the Wife being at the same time examined, and the acknowledgment and examination being indorsed, is make effectual to pass the Wife's estate.

By 2 G. 4, c. 1, s. 16, Assignments of Slaves, who have not been registered according to the provisions of that Act, are made void. And by 4 G. 4, c. 6, s. 6, no sale or transfer is to be made by which slave families may be divided.

The Bermudas.

These Islands were colonised from England about 1609. They have a Court of Chancery, a Court of *General Assize*, and a Court of Error, with some others.

By an Act of 3 Anne, amended by 22 G. 3, the English Law of distribution upon Intestacy is adopted.

By 6 Anne, a quiet possession of Lands for twenty years is made a good Title, except against persons in remainder or reversion, who may make their claim within twenty years after the cause of Action accrued.

Persons disabled may claim within seven years after their disabilities removed.

By 19 G. 3, and 43 G. 3 Deeds acknowledged before the Chief Justice of one of the Courts in the Island, or before Commissioners appointed by such Chief Justice, and recorded within six months in the Secretary's Office, are made effectual to pass the estates and bar the Dower of Femes Covert.

By 22 G. 3, Distresses for Rent, and Notices to Tenants at Will, are regulated. It appears by this Act that Slaves are personal Estate.

By another Act of 22 G. 3, Warranties made by Tenant for life are void against persons in reversion or remainder; and all Collateral Warranties made by a person not having an estate of inheritance in possession are void against his heir.

By 26 G. 3, the particulars of every mortgage are to be given in to the Secretary's Office, in order to registration, or subsequent mortgages so notified will have precedence.

By another Act of 26 G. 3, Assignees of Bonds, &c. may sue for the debt in their own name. This Act was temporary, but has been continued, at least to 21st June 1826.

By 27 G. 3, the execution for debt against Real Estate is regulated.

By 29 G. 3, an Estate Tail in any parcel of land not exceeding five Acres may be converted into Fee Simple, by Bargain and Sale, Feoffment, or Lease and Release, recorded in the Secretary's Office.

By 39 G. 3, Fines and Recoveries in the Island Courts are confirmed and regulated.

By 60 G. 3, (which seems to be only a temporary Act,) the property of discharged Prisoners for debt is vested in the Provost Marshal for the benefit of the Creditors.

The Leeward Caribbee Islands.

The following enactments of the General Assembly of these Islands, of 4 Anne, are in force (so far as they are not controlled by the peculiar laws of each Island) in Antigua, Montserrat, St. Christopher's, Nevis and the Virgin Islands.

[See p. 594, n. *a*.]

All Negroes, and other Slaves, Coppers, Stills, and all Cattle, Horses, Asses, commonly used and exercised upon and about any plantation, and all other plantation utensils, are declared or made inheritance and affixed to the Freehold. But it is to be observed that in Montserrat and St. Kitt's, and also in the Virgin Islands, Slaves are understood to be personal estate, though no written law of those Islands (or at least of the two last) appears in opposition to this general enactment.

If a husband devise to his wife a third part of his estate, and devise the rest to others; this provision for the wife shall be in bar of Dower, unless she disagree within three years after her husband's death, or her own subsequent attainment of full age.

" A Deed in due form of law, made and executed " by the husband and wife, of the plantations, lands " and tenements, negroes and other hereditaments of " the wife, or whereof the husband was solely and in " his own right seised at any time during the cover- " ture, or whereof the husband and wife were seised " in right of the wife, or the husband jointly with the " wife, or by tenant in tail general or special, and by " the party or parties, and each of them, from whom " the interest passes, acknowledged before some of " Her Majesty's Justices of the Court of Common " Pleas in England or Ireland, or of any of the Lee- " ward Caribbee Islands wherein such plantation, &c. " do lie," shall have the effect of Fine or Recovery.

Provided that the Wife who is a party to such Deed be of full age, and be privately examined by the Judge, and her examination indorsed, together with the acknowledgment of the party from whom the interest passes, and that such acknowledgment be subscribed by the Judge. Every such Deed is also to be inrolled at length in the Secretary's or Registrar's Office of that Island wherein the estate lies (if the Deed be executed and acknowledged in any of the Leeward Caribbee Islands), within six calendar months after the acknowledgment; and if the Deed be executed and acknowledged in England or Ireland, then to be inrolled at length in the High Court of Chancery of the same kingdom, within six calendar months after the acknowledgment. And the acknowledgment subscribed by the Judge shall be a sufficient proof of the due execution of the Deed; and the Record, or an Exemplification or Attested Copy of such Deed, shall be allowed to be given in evidence, where the original Deed is mislaid and cannot be procured.

By an Act of 38 G. 3, (which does not appear to extend to the Virgin Islands, as they were separated from the rest in 1773,) Debts for provisions and clothing supplied to Slaves belonging to a Plantation, or not less than twenty in number, are to be considered as specific or prior liens on the Slaves, if an Action be commenced within one year.

Antigua.

This Island was settled by the English in 1632. It has a Court of Chancery, a Court of Error and Appeal, a Court of Common Pleas, a Court of Ordinary, and other Courts.

By several Acts of Assembly, the registration of Deeds is required; and ultimately, by 4 G. 3, it is provided " that all Deeds, Conveyances and Assur-

"ances which shall be executed in any parts beyond "the seas, of and concerning lands, tenements, slaves, "rents, and other freeholds and inheritances, lying "and being in Antigua, or the Islands adjacent and "thereto belonging, shall be good and effectual to "pass estates and interests, &c. according to the pur- "port, words, and lawful intention of the same Deeds, "without livery of seisin or attornment," &c. and to bar estates tail, &c. Provided always, that the Deeds be recorded in the Registrar's Office within two years after execution. And with respect to estates tail and married women, the provisions of the * Act of General Assembly before mentioned, are adopted. Deeds acknowledged and certified according to that Act may be recorded without further proof or acknowledgment. Office copies as good evidence as the originals. The time of bringing the Deed to the Office is to be indorsed as the time of registration.

By 27 Car. 2, s. 11. "In actions concerning the "Titles of Lands, it shall be a good plea in bar to "such action, for the defendant to allege that he, and "they whose estate he hath, have been in quiet and "peaceable possession of the said land in question, "for and during the space of five years; and this plea, "duly entered, shall bar the plaintiff or demandant, "unless he can disprove the same, or make it appear "that the said five years quiet possession incurred "during the time the said plaintiff or demandant was "under the age of twenty-one years, a woman under "coverture, or of unsound memory, or that the defen- "dant or tenant held the same as his attorney, tenant, "servant or overseer, [*or*] by virtue of some particular "estate for years, life, or in tail, which at or before

* By 39 G. 3, the Deed may be acknowledged before any Justice of the King's Bench, (as well as of the Common Pleas,) or any Baron of the Exchequer, in England or Ireland.

"the time of the action brought was expired." And by s. 1, all claims to lands or tenements must be made by Action at Law; and by s. 13, must be brought to trial within five years, or the plaintiff to be for ever barred. See also 4 W. & M. and 5 G. 1, which are retrospective Acts.

By 4 W. & M. Slaves are declared to be Real Estate, but with power to Executors and Administrators to inventory them, &c. for payment of debts. [See p. 594, n. *a*.]

By 1 Anne, Protestant Aliens are enabled, under certain restrictions, to purchase lands, &c.

Another Act of the same year regulates the rights of the personal representatives of deceased tenants, and the persons in remainder or reversion, &c. with respect to emblements and improvements.

By 11 Geo. 2, Legal Interest is reduced to six per cent, after 1st October 1738.

By 31 G. 2, Infant Trustees or Mortgagees may convey by direction of the Court of Chancery or Exchequer of Antigua.

By 26 G. 3. Agreements for sale of lands, slaves, tenements or hereditaments, or made in consideration of marriage, must be in writing, and signed by the party to be charged therewith, or some other person thereupon by him lawfully authorized. "All devises "and bequests of any lands, slaves or tenements shall "be in writing and signed by the devisor, or by some "other person in his presence, and by his express "directions, as his last will and testament, in the "presence of one credible white witness, who shall "attest and subscribe the same in the presence of the "said Devisor, or shall be wholly written, dated and "subscribed by the proper hand of the said devisor, "or else shall be utterly void." But Wills of persons of colour may be attested by any free persons of colour. Devises to be revoked in like manner, or by cancellation, &c. Devises, &c. to the attesting witness are

made void; but a Creditor whose debt is charged upon land by the Will may be a Witness.

By 26 G. 3, the application of money raised under an execution is regulated.

By 31 G. 3, (a temporary Act, but continued at least down to 1825,) s. 59, Probates of Wills are *primâ facie* evidence, the Wills and Probates being first recorded in the Secretary's Office, and (for devises of realty) in the Registrar's Office also. By s. 93, Executions bind Slaves and Goods only from the time of Delivery to the Marshal. By s. 100, Conveyances are declared void against Creditors, unless the party to whom they are made prove them to be for valuable consideration. By s. 101, the English Statute of Fraudulent Devises is adopted. By s. 102, the benefit of a Trust is made Assets, and saleable on execution for debt; and estates *pur autre vie* are made devisable. The rest of the Act relates principally to Sales by the Marshal.

By 50 G. 3, provision is made for Partitions between Coparceners, Joint-tenants and Tenants in Common.

By 1 G. 4, provision is made for the relief of Insolvent Debtors, being in prison on 1st August 1820; and their property is vested in the Deputy Provost Marshal.

Montserrat.

This Island was first planted by the English in 1632. It has Courts of Chancery, of King's Bench and Common Pleas, of Error, of Ordinary, &c.

By an Act of 9 Car. 2, all written Instruments made in the Island (with some exceptions,) if not made in the Secretary's Office, and by him or his substitute, are to be void.

By 3 G. 2, among other things, Sales by the

Marshal are regulated; and the English Statutes of Distribution upon Intestacy are adopted. See also 26 G. 2.

By an Act of the same year, as also by one of 4 Anne, a limitation of time is fixed for suits relating to land; but the provisions are not prospective.

By 9 G. 2, all sums of money which may be lent by any Merchant or Factor in Great Britain to any person residing in Montserrat, shall carry interest according to the legal rate in Great Britain, as if secured by Bond.

By another Act of the same year, interest is reduced to eight per cent.

By 26 G. 2, the principal provisions of the English Statute of Frauds are adopted. And with respect to Slaves, (which are declared to be Chattels by the practice of the Island,) writing and signature are made necessary for their transfer; but Wills relating to them are not required to be attested, unless for the revocation of a prior Will, in which case two witnesses are required.

By 28 G. 2, a Memorial of every Deed or Conveyance, and Will, relating to Lands, Tenements, Hereditaments or Slaves, may be registered, and Deeds not first registered, and Wills not registered in time, are to be void against subsequent purchasers and mortgagees for valuable consideration. Wills are to be registered, if the Testator die in Montserrat, within six months; if within any other of the Leeward Caribbee Islands, within twelve months; and if beyond the seas within three years; but a proviso is added, allowing a memorial of contest or impediments to be registered within the same time respectively. Deeds and Wills may also be inrolled at length, and the Office Copies of them will be good secondary evidence. This inrolment renders the re-

gistration of a Memorial unnecessary. Certificates of the satisfaction of Mortgages may also be inrolled.

St. Christopher's.

This Island was first settled by the English in 1623. It has Courts of Chancery, of King's Bench and Common Pleas, of Error, of Ordinary, &c.

By 10 G. 1, and 15 G. 2, Sales * by the Marshal are regulated. And by the former of these Acts, the English Statutes of Distribution on Intestacy, and Statute of Frauds, among others, are adopted. Interest also is reduced to eight per cent; and Attornment is made unnecessary.

By 2 G. 2, and 31 G. 2, Deeds and Conveyances, and Wills, relating to Lands, &c. or to Slaves, are to be registered; absolute Conveyances and Wills, within three calendar months after execution, or the Testator's death, if taking place in St. Kitts, but otherwise within two years; Mortgages within one calendar month, or one year. Deeds to be acknowledged or proved (if beyond the seas) before a Justice of the King's Bench or Common Pleas, &c. In case of contest or impediment, Wills may be registered within six months after the obstacle removed. The limitation of time seems to be material, in all cases, only as affording an equivalent to immediate registration. Office Copies are made good secondary evidence.

By 5 G. 4, provision is made for Mortgages, &c. to Corporations and Companies.

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* See also 53 G. 3.

Nevis.

The English are said to have settled on this Island in 1628. It has Courts of Chancery, of King's Bench and Common Pleas, of Error, of Ordinary, &c.

By 2 W. & M. the English Statute of Frauds is by implication adopted.

By 10 W. & M. the Slaves, Coppers, Mills and Stills of persons dying intestate are made chattels, so far as to be distributed among their children as the law directs. The law here meant is probably that contained in the English Statutes of Distribution. This Act of the Assembly of Nevis is recognised and confirmed in the Act of General Assembly of 4 Anne before mentioned, relating to the same subjects. [See p. 594, n. *a*.]

By 12 W. & M. Purchases of Lands, &c. by Papists, are made void.

By 8 Anne, and 2 G. 3, Deeds, Conveyances and Wills, relating to messuages, lands, tenements, hereditaments or slaves (being of the nature of real estate, &c) are to be registered in the Secretary's Office; and against subsequent purchasers and mortgagees, such Deeds or Conveyances, unless first registered, and Wills unless registered in due time, are made void. All such Instruments to be acknowledged or proved, (if in Great Britain or Ireland,) before a Justice of B. R. or C. B. or Baron of the Exchequer. The time of Registry to be indorsed. Wills to be registered within three calendar months after Testator's death, if in Nevis, or within two years if beyond the seas; or Memorial of contest or impediment to be entered within the same time, and then the Will to be registered within six months after removal of the obstacle. But purchasers not to be prejudiced by any concealed Will, unless actually registered within four years after the Testator's death.

Certificates of satisfaction of Mortgages may also be recorded. Gifts of slaves which, not being affixed to any Plantation, are personal estate, must also be recorded, or will be void. Office Copies are made good secondary evidence.

By 9 G. 3, Mortgages of slaves are required to be inrolled immediately, if made in the Island, and within twelve calendar months if elsewhere. Office Copies are made good evidence.

By 54 G. 3, provisions are made for extending the Act of General Assembly, relating to Deeds having the effect of Fines and Recoveries, to Deeds executed in the East Indies.

By 5 G. 4, provision is made for Mortgages, &c. to Corporations and Companies.

The Virgin Islands.

These Islands seem to have been peopled by the English about 1666. They have Courts of Chancery, of Common Pleas, of Error, of Ordinary, &c.

No Acts of Assembly necessary to be here mentioned occur in Mr. Howard's Collection.

The rest of His Majesty's Colonies in the Western Hemisphere are governed for the most part by the Laws of other European Nations from which they have been conquered, though with considerable modifications introduced by Orders in Council. These Laws have no connexion with the present work.

The East Indies.

It sometimes happpens that questions relating to Real Property situated in the Cities of India occupied by the English come to be decided in English Courts of Equity. On this head the reader may consult *Larkins* v. *Larkins*, 3 B. & P. 16, 109; *Gardiner* v. *Fell*, 1 J. & W. 22; *Cumming* v. *Forrester*, 2 J. & W. 334: from which Cases it may be collected that in general the Common Law of England, though modified by the Customs of the place, and also that the Statute of Frauds, as relating to Devises, or some similar Law, is in force at Calcutta. The Law of Real Property in these Settlements, however, appears in general to be in a very uncertain state.

INDEX.

The Numbers refer to the Pages.

STATUTES—*continued.*

STATUTES—*continued.*

THE END.

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